



Control Number: 51812



Item Number: 199

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April 22, 2021

**Via Electronic Filing**

Ms. Deven Reeves  
Filing Clerk  
Public Utility Commission of Texas  
Central Records  
1701 N. Congress Avenue  
Austin, Texas 78701

Re: Project No. 51812; *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*

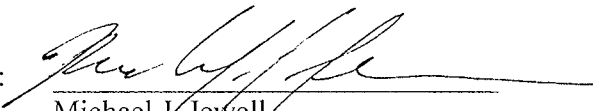
Dear Ms. Reeves:

Consistent with Paragraph 6 in the attached, I am filing a copy of the Original Petition for Judicial Review, and Alternatively, Suit for Declaratory Judgment, and Alternatively, for Writ of Mandamus or Injunction, with Exhibits, that were filed in Travis County District Court on April 21, 2021.

Should you have any questions or concerns with regards to the enclosed, please do not hesitate to contact our office.

Thank you for your time and attention to this matter. Both are sincerely appreciated.

Very truly yours,

By:   
Michael J. Jewell

Jewell & Associates, PLLC  
8404 Lakewood Ridge Cove  
Austin, TX 78738-7674  
(512) 423-4065

*Attorney for TX Hereford Wind,  
LLC; Miami Wind I, LLC;  
Goldthwaite Wind Energy LLC; and  
Ector County Energy Center LLC*

Enclosures

CAUSE NO. \_\_\_\_\_

RWE RENEWABLES AMERICAS  
LLC, TX HEREFORD WIND, LLC,  
MIAMI WIND I, LLC,  
GOLDTHWAITE WIND ENERGY  
LLC and ECTOR COUNTY  
ENERGY CENTER LLC,

Plaintiffs/Appellants,

v.

ARTHUR D'ANDREA, Chair, and  
Commissioners JAMES W.  
McADAMS, and DOE, in their official  
capacities as Commissioners of the  
Public Utility Commission of Texas,<sup>1</sup>

and

PUBLIC UTILITY COMMISSION  
OF TEXAS,

Defendants.

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**ORIGINAL PETITION FOR JUDICIAL REVIEW, AND ALTERNATIVELY, SUIT  
FOR DECLARATORY JUDGMENT, AND ALTERNATIVELY, FOR WRIT OF  
MANDAMUS OR INJUNCTION**

TO THE HONORABLE COURT:

COME NOW, TX Hereford Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy  
LLC; Ector County Energy Center LLC; and RWE Renewables Americas LLC and its affiliates  
("RWE") (collectively, "Plaintiffs/Appellants") and, pursuant to the Public Utility Regulatory Act,

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<sup>1</sup> This petition for judicial review arises out of orders issued by the Public Utility Commission during the historic winter storm of February 2021. Subsequent to the storm, all three Commissioners then serving resigned. At the time of filing, Commissioner McAdams has been appointed and confirmed by the Texas Senate; Chairman D'Andrea's replacement has been appointed and confirmed, but not sworn in. When Chairman D'Andrea's replacement is confirmed, his replacement will be automatically substituted as a defendant. A third Commissioner has not been named. The final Commissioner is herein identified as "Commissioner Doe" until such time as the third Commissioner is appointed and confirmed. Cf. Tex. R. App. P. 7.2 (requiring substitution of a public official's successor when an official ceases to hold office before the proceeding is finally adjudicated).

**ORIGINAL PETITION FOR JUDICIAL REVIEW, AND ALTERNATIVELY, SUIT FOR  
DECLARATORY JUDGMENT, AND ALTERNATIVELY, FOR WRIT OF MANDAMUS OR  
INJUNCTION**

Tex. Util. Code § 15.001 (“PURA”), Texas Administrative Procedure Act, Tex. Gov’t Code §§ 2001.035, 2001.038, 2001.171, 2001.174, 2001.176 (“APA”), file this Original Petition for Judicial Review, and Alternatively, Suit for Declaratory Judgment, and Alternatively, for Writ of Mandamus or Injunction, asking that the “orders” of the Public Utility Commission of Texas (“PUC” or “Commission”) dated February 15 and 16, 2021 (the “Orders”) filed in Project Nos. 51617 and 51812,<sup>2</sup> included hereto as Exhibit “A,” Exhibit “B,” Exhibit “C,”<sup>3</sup> and Exhibit “D,”<sup>4</sup> be voided and reversed. Alternatively, Plaintiffs/Appellants seek a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 37.001-011, that Commissioners D’Andrea, McAdams, and Doe acted *ultra vires* and outside the scope of their legal authority in promulgating the Orders and/or allowing the Electric Reliability Council of Texas (“ERCOT”) to exceed the Orders and refusing to correct certain pricing. Further in the alternative, Plaintiff/Appellants seek a writ of mandamus or injunction directing Defendant PUC and PUC Commissioners, D’Andrea, McAdams, and Doe, to withdraw the voidable Orders and/or to correct pricing.<sup>5</sup> In support thereof, Plaintiffs/Appellants respectfully show the Court the following:

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<sup>2</sup> *Oversight of the Electric Reliability Council of Texas*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Mar. 1, 2021); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Memorandum re: Corrected Commission Order Directing Action by ERCOT (Mar. 22, 2021).

<sup>3</sup> Exhibit “C” includes copies of the Orders and Commission Counsel’s memorandum dated February 17, 2021, moving copies of the Orders from Project No. 51617 to Project No. 51812.

<sup>4</sup> Exhibit “D” includes copies of the Orders and Commission Counsel’s memorandum dated March 22, 2021, stating that “corrected” versions of the Orders were attached to the memorandum.

<sup>5</sup> On March 2, 2021, Luminant Energy Company LLC filed an appeal of the Orders in the Court of Appeals for the Third Court of Appeals District of Texas—Austin pursuant to PURA §§ 39.001(e) and (f). *See Luminant Energy Company LLC v Public Utility Commission of Texas*, No. 03-21-00098-CV (Tex. App.—Austin, pending). Sections 39.001(e) and (f) allow for judicial review of the validity of “competition rules adopted by the commission” in the Third Court of Appeals. *See generally* PURA §§ 39.001(e) and (f). In its Notice Regarding Filing of Record in the

## **I.** **PARTIES**

1. Plaintiff/Appellant RWE is a foreign limited liability company organized and existing under the laws of the State of Delaware with its principal place of business located at 353 N. Clark Street, 30th Floor, Chicago, Illinois 60654. RWE is authorized, and registered, to do business in the State of Texas and is a market participant impacted by the Orders appealed herein. RWE companies own and operate twenty-one renewable generation projects throughout Texas, a combination of wind and solar, and associated energy storage projects all within ERCOT with additional projects currently under construction within ERCOT.

2. Plaintiff/Appellant TX Hereford Wind, LLC is a foreign limited liability company organized and existing under the laws of the State of Delaware. TX Hereford Wind, LLC's principal place of business is located at 4501 FM 1259 Hereford, Texas 79045. It is authorized, and registered, to do business in the State of Texas and is a market participant impacted by the Order appealed herein. It owns and operates a wind generation resource within ERCOT.

3. Plaintiffs/Appellants Goldthwaite Wind Energy LLC and Ector County Energy Center LLC are foreign liability limited companies organized and existing under the laws of the State of Delaware with their principal place of business located at 1 S. Wacker Dr. Chicago, Illinois 60606. Plaintiff/Appellant Miami Wind I, LLC is a domestic limited liability company organized and existing under the laws of the State of Texas with its principal place of business located at 1 S. Wacker Drive, Chicago, Illinois 60606. These companies are authorized, and registered, to do

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*Luminant* case, the Commission has taken the position that “the Court [of Appeals] lacks jurisdiction, because th[e] Court[] [of Appeals]’ power to hear a direct appeal from a PUC decision is limited to ‘[j]udicial review of the validity of competition rules.’” See the Commission’s Notice Regarding Filing of Records, *Luminant*, No. 03-21-00098-CV at p. 1 and p. 1 n.1 (citing PURA, Tex. Util. Code §§ 39.001(e) and (f) (emphasis in original)). To the extent that this Court is the proper forum for review, this case and Plaintiffs/Appellants’ claims should proceed here.

business in the State of Texas and are market participants impacted by the Orders appealed herein. They own and operate a diverse mix of energy resources within ERCOT.

4. Defendant/Appellee PUC is an administrative agency of the State of Texas charged with the responsibility for the regulation “relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants” pursuant to Tex. Util. Code § 39.151(d). The PUC may be served with process pursuant to Rule 106(a)(1) of the Texas Rules of Civil Procedure and 16 Texas Administrative Code § 22.22 by personally serving, in his official capacity, Thomas Gleeson, Executive Director, 1701 North Congress Avenue, 7th Floor, Austin, Texas 78701. Plaintiffs/Appellants request that the Clerk of the Court issue service of process to the PUC pursuant to Texas Rule of Civil Procedure 99.

5. Defendants Chair Arthur D’Andrea (“D’Andrea”), Commissioner James W. McAdams (“McAdams”), and Commissioner Doe (“Doe”) (together, the “Commissioners”), sued here in their official capacities, are Commissioners of the PUC. D’Andrea, McAdams, and Doe may also be served with process pursuant to Rule 106(a)(1) of the Texas Rules of Civil Procedure and 16 Texas Administrative Code § 22.22 by personally serving, in his official capacity, Thomas Gleeson, Executive Director, 1701 North Congress Avenue, 7th Floor, Austin, Texas 78701. Plaintiffs/Appellants request that the Clerk of the Court issue service of process to the PUC pursuant to Texas Rule of Civil Procedure 99.

6. A copy of this Original Petition will be filed in Commission Docket No. 51812 consistent with the requirements of Texas Government Code § 2001.176(b)(2).

**II.**  
**DISCOVERY CONTROL PLAN**

7. Discovery, if necessary, should be conducted under Level 3 of Texas Rule of Civil Procedure 190.4.

**III.**  
**RULE 47 RELIEF STATEMENT**

8. In accordance with the requirements of Rule 47 of the Texas Rules of Civil Procedure, Plaintiffs/Appellants seeks relief as set forth herein. Plaintiffs/Appellants also demands a judgment for all other relief to which it is entitled.

**IV.**  
**INTRODUCTION**

9. In February 2021, the state of Texas experienced an unprecedented winter storm that caused the loss of more than 40,000 MW of electric generation resources within ERCOT power region. ERCOT declared its highest state of emergency, and Emergency Energy Alert Level 3 (“EEA 3”) due to high electrical demand exceeding supply. ERCOT then ordered utilities to reduce customer electric demand through rolling electricity outages (known as “firm load shed”) to avoid a system-wide failure on the Texas electric grid.<sup>6</sup>

10. In response to energy prices in the ERCOT-run wholesale market clearing at less than \$9,000, which is the maximum price during scarcity conditions pursuant to 16 Tex. Admin. Code (“TAC”) § 25.505(g)(6)(B), the PUC *sua sponte* issued the Orders at issue here during two

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<sup>6</sup> ERCOT Market Notice, M-C021521-01 Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices. (Feb. 15, 2021); ERCOT Market Notice, M-C021521-02, Update: Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 16, 2021); ERCOT Market Notice, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021).

brief emergency open meetings.<sup>7</sup> The Orders directed ERCOT to include firm load in ERCOT's scarcity pricing signals, which artificially set ERCOT's system-wide offer cap at \$9,000/MWh.<sup>8</sup> The \$9,000/MWh is the maximum amount permitted under the PUC's rules in 16 TAC 25.505(g)(6)(B)—and hundreds of times higher than the average price of electricity. The PUC set the price at the higher cap despite the fact that the existing pricing formula should have set the price at just a fraction of what was ordered. In other words, instead of permitting the competitive market to dictate the price of energy at the highest offer accepted at any given location, every MWh sold was priced arbitrarily at \$9,000, in contravention of the PUC's rules and ERCOT's protocols. The wholesale market prices in ERCOT remained at \$9,000 per MWh until 9:05 a.m. on February 19<sup>th</sup>.

11. The PUC's Orders requiring ERCOT to include the artificial price adder did not resolve the generation supply challenges. Outages continued for days after the PUC ordered the artificial adjustment raising prices to the maximum level. And the Orders remained in place for *days*—truly unprecedented, as the wholesale prices in ERCOT have rarely reached this cap and for only a few hours at a time at most. The PUC's arbitrary interference drastically interfered with the longstanding rules governing the electric market and caused disastrous financial consequences that have rocked the state.

12. Plaintiffs/Appellants were market participants that were harmed by the PUC's unprecedented and procedurally unlawful interference in the ERCOT wholesale market that arbitrarily set prices at astronomically high levels. They sought relief at the Commission in March,

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<sup>7</sup> See PUC Emergency Open Meeting, *available at* [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210215/](http://www.adminmonitor.com/tx/puct/open_meeting/20210215/) (Feb. 15, 2021); PUC Emergency Open Meeting, *available at* [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210216/](http://www.adminmonitor.com/tx/puct/open_meeting/20210216/) (Feb. 16, 2021).

<sup>8</sup> See Exs. A, C, and D.



filing motions for rehearing and asking the Commission to reconsider its errant Orders, identifying their technical failures, the Commission's lack of authority to issue these orders, and their flawed policy.

13. Despite these filings and other similar filings by other market participants, as well as intense questioning by members of the state Legislature alarmed by the Commission's actions, the Commission has taken no heed, denying the Plaintiffs/Appellants' motions by operation of law which left the artificially high ERCOT wholesale market prices in place. With the devastating financial consequences of the Orders, and having exhausted all administrative remedies at the Commission, Plaintiffs/Appellants have no choice but to file this petition and seek relief from the courts to correct the Commission's unlawful actions.

14. This lawsuit appeals the denial of the motions for rehearing and seeks to have the Orders overturned and voided, as well as asserting alternative claims for declaratory, mandamus, and injunctive relief to correct the Commission's actions.

**V.**  
**REQUEST FOR PRODUCTION OF RECORD**

15. In accordance with the requirements of the APA § 2001.175, Plaintiffs/Appellants request that the Commission transmit the original or a certified copy of the entire record of such proceedings to the Court within the time permitted by law for the filing of an answer in this cause.

**VI.**  
**JURISDICTION AND VENUE**

16. This Court has jurisdiction over this action because Plaintiffs/Appellants seek judicial review of the Orders issued by the PUC and/or a declaratory judgment setting aside the PUC Orders and rules promulgated via the Orders. The District Court has jurisdiction to hear this

suit for judicial review and/or declaratory judgment pursuant to PURA, Tex. Util. Code § 15.001 and the APA, Tex. Gov't Code §§ 2001.035, 2001.038, 2001.171, 2001.174, and 2001.176.

17. Plaintiffs/Appellants timely filed motions for rehearing on March 12, 2021. A copy of Plaintiffs/Appellants' Motions for Rehearing are attached hereto as Exhibit "E" and Exhibit "F." The Commission did not act on the motions, and they were overruled by operation of law. *See* Tex. Gov't Code § 2001.146(c). Plaintiffs/Appellants are aggrieved by the Orders, have exhausted all administrative remedies, and are therefore entitled to judicial review. This Petition is filed within 30 days of the date the order became final and appealable as required by the APA, Tex. Gov't Code § 2001.176.

18. Venue is mandatory in Travis County, Texas, pursuant to applicable statutes, specifically, the APA, Tex. Gov't Code §§ 2001.038(b) and 2001.176(b)(1).

19. Alternatively, this is a suit for declaratory judgment under the Uniform Declaratory Judgments Act, seeking a declaration that Commissioners D'Andrea, McAdams, and Doe acted without legal authority in promulgating the Orders and/or allowing ERCOT to exceed the Orders and refusing to correct certain pricing. Tex. Civ. Prac. & Rem. Code § 37.001-.011.

20. Further in the alternative, Plaintiffs/Appellants seek a writ of mandamus or injunctive relief to require the Commission and its Commissioners to withdraw the Orders that, as explained below, the Commission lacked the authority to issue and/or improperly enforced. Alternatively, this is a suit for writ of mandamus or injunctive relief to require the Commission and its Commissioners to correct pricing, as set forth below. This Court has jurisdiction to issue writs of mandamus or injunctions to compel a public official to perform a ministerial act. Tex. Const. art. V. § 8; *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). Mandamus or injunctive relief is also appropriately applied to correct a clear abuse of discretion or an *ultra*

*vires* act by a public official. *Id.* (citing *Womack v. Berry*, 291 S.W.2d 677, 682 (Tex. 1956)); *see also Crystal Intern'l, Inc. v. Tex. Comm'n on Envtl. Quality*, No. 03-16-00008-CV, 2016 WL 4272117, at \*3 (Tex. App.—Austin Aug. 10, 2016, no pet) (recognizing mandamus power of district court to compel state official compliance with law); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371-372 (Tex. 2009). A statutory waiver of immunity from suit is not necessary for a cause of action for *ultra vires* actions. *Heinrich*, 284 S.W.3d at 371–72.

## VII. STATEMENT OF FACTS

### A. Introduction

21. In February 2021, the state of Texas experienced an unprecedented winter storm which required ERCOT to order “firm load shed” to avoid a system-wide failure.<sup>9</sup> The PUC *sua sponte* issued the two Orders during two brief emergency open meetings;<sup>10</sup> those Orders directed ERCOT to modify the implementation of its rules and include firm load in ERCOT’s scarcity pricing signals, which artificially set wholesale electricity prices in ERCOT at ERCOT’s system-wide offer cap of \$9,000/MWh, the maximum amount permitted under the PUC’s rules in 16 TAC § 25.505(g)(6)(B).<sup>11</sup> In other words, instead of permitting the competitive market to dictate the price of energy at the highest offer accepted at any given location, as required by the PUC’s and ERCOT’s protocols, every MWh sold was artificially priced at \$9,000.

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<sup>9</sup> ERCOT Market Notice, M-C021521-01 Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices. (Feb. 15, 2021); ERCOT Market Notice, M-C021521-02, Update: Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 16, 2021); ERCOT Market Notice, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021).

<sup>10</sup> *See* PUC Emergency Open Meeting, available at [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210215/](http://www.adminmonitor.com/tx/puct/open_meeting/20210215/) (Feb. 15, 2021); PUC Emergency Open Meeting, available at [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210216/](http://www.adminmonitor.com/tx/puct/open_meeting/20210216/) (Feb. 16, 2021).

<sup>11</sup> *See* Exs. A, C, and D.

22. While each of the Commissioners were reluctant to issue the Orders,<sup>12</sup> the Commission's actions were purportedly made with the intent to either penalize generators or incentivize generation to come online. But the generation was simply not available. Chairman D'Andrea admitted in sworn testimony to the Legislature that the Commission "made some decisions that first week that didn't make economic sense" because the Commission was focused on getting electricity back on.<sup>13</sup>

23. Unsurprisingly, the mandated maximum prices did *not* increase the amount of electric supply available in the market. The artificial price adjustment did not make generators produce more electricity because any generation that could produce electricity was already producing. Moreover, as Chairman D'Andrea testified before the Legislature, ERCOT kept prices at \$9,000/MWh for approximately 32 hours after ERCOT ended the mandated firm load shed due to a theoretical concern that industrial customers may come back online too soon. However, Chairman D'Andrea later acknowledged that the timing of the industrial load coming back was not a real threat.

**Senator Johnson:** "It seems to me that there actually is not a whole lot in dispute right now. The cap probably shouldn't have been at \$9,000 and it was extremely difficult to make that call under the circumstances. The industrials coming back online, was it a threat. You tell me if it was really a real threat because they're not going to make that decision to come back online at the end of that week without consulting ERCOT, are they?"

**D'Andrea:** This is hard for me to tell. I think you're probably right. I think I share your intuition..."<sup>14</sup>

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<sup>12</sup> Open Meeting Tr, at 3:11-12 (Feb. 15, 2021) (Comm'r D'Andrea: "I didn't like the idea of just sort of blindly moving money from one pocket to another"), 3:22 (Comm'r Botkin: "[T]hese changes are – they are a big deal"), and 4:12-13 (Chairman Walker: "I think this is something we've kind of wrestled with in the past . . . this will send some incorrect signals too").

<sup>13</sup> Testimony of Arthur D'Andrea before the Senate Jurisprudence Committee at 4:09:42 (Mar. 11, 2021) *available at* [https://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=49&clip\\_id=15446](https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15446).

<sup>14</sup> Testimony of Arthur D'Andrea before the Senate Jurisprudence Committee at 4:40:14 (Mar. 11, 2021) *available at* [https://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=49&clip\\_id=15446](https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15446).

24. The results of these events were catastrophic, both for the citizens of the State and for the participants in the electric industry. Texans continued to face days of blackouts in temperatures well below freezing, and the PUC's orders caused certain market participants catastrophic financial losses, while others benefitted from significant windfalls. Even Chairman D'Andrea stated, "I didn't like the idea of just sort of blindly moving money from one pocket to another"<sup>15</sup> And, disruptive it was. Specifically, the Orders have caused multiple billions of dollars of losses in Texas. Plaintiffs/Appellants in particular suffered significant financial harm as a direct result of the PUC's Orders.

25. The PUC's actions were unlawful and outside the PUC's authority under either regular or emergency circumstances. Specifically, the PUC unilaterally reset ERCOT competitive pricing at the maximum possible price under the PUC's rules, which it lacks authority to do. No authority allows the PUC to engage in such actions. However, ERCOT and the PUC had an option, authorized by law, that would have had the effect of requiring any generator capable of generating to provide energy.

26. Section 5 of the ERCOT protocols sets out the procedures and guidelines for reliability unit commitment ("RUC"), which is used to ensure ERCOT system reliability and to ensure enough resource capacity, in addition to ancillary service capacity, is committed in the right locations to reliably serve the forecasted load on the ERCOT system. The Commission and ERCOT did not use the RUC process here. Such narrowly tailored actions not only would have been procedurally correct, but also based on existing rules and protocols.

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<sup>15</sup> Open Meeting Tr. at 3:11-12 (Feb. 15, 2021).

27. In response to questioning from Legislators, Chairman D’Andrea acknowledged that he should have used the RUC process as opposed to artificially inflating prices:

**D’Andrea:** I think I told you, I definitely told B&C, if you had told me Monday morning you have four more days of this, I would have said “Suspend market rules, we’re RUCing everybody” right, this is crazy. At the time, I was like, they’re getting penalized, surely they’ll be on any hour now, it’s warming up, surely they’ll be on any hour now. And that was a mistake. We need some kind of circuit breaker that says the generators have made enough today or in the last 12 hours or whatever it is, that number is and we’re going to cost-plus. And that’s what I wish would have done in retrospect, I just, I know, people didn’t even start talking that way until Wednesday, and then it felt sort of like, well, now, what’s going on, so, anyway.<sup>16</sup>

28. Further, in addition to admitting that the RUC process would have been a better option, the Commission has initiated a rulemaking to change its own price cap rule—not to authorize actions similar to those it took—but to prevent pricing anomalies from occurring in the future.

29. The PUC’s decision to unlawfully alter energy prices caused dramatic negative impacts to the entire ERCOT electric market. The PUC’s actions were taken quickly with no notice, depriving market participants of due process and the opportunity for a hearing before making changes to the market that substantially affected market participants’ rights.

30. The rights of affected parties are in great peril, exacerbated by the fact that the Commission failed to follow required procedures when it adopted the Orders. Because the Commission refused to enter the Orders through lawful procedures, parties have been left to pursue multiple avenues of judicial review, which puts yet another unnecessary burden on market participants. The PUC’s attempt to circumvent the system should be reversed and the Orders at issue voided in accordance with relevant rules, statutes, and applicable case law.

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<sup>16</sup> Testimony of Arthur D’Andrea before the Senate Jurisprudence Committee at 4:52:37 (Mar. 11, 2021) *available at* [https://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=49&clip\\_id=15446](https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15446).

31. Ultimately, the PUC unlawfully changed ERCOT prices in violation of its own authority, contrary to controlling requirements, and without providing adequate notice to market participants, whose rights were at stake. This type of procedural and substantive overreach must be corrected; and stability that participants expect from the Texas electric market must be restored.

32. Not only were the PUC's Orders outside the scope of its authority and procedurally invalid (whether viewed under the emergency powers or not), the Orders and the resulting implementation of artificial pricing at the maximum level did not and could not work to bring additional generation to the market at that time (nor were the Orders themselves even followed). The PUC failed to follow procedural requirements and lacked authority under PURA or its own rules to unilaterally modify competitive pricing in the ERCOT wholesale market. Accordingly, the Orders should be reversed. Doing so is legally required; it will also provide necessary mitigation of the extraordinary harm that has resulted from the prolonged imposition of mandatory artificial and extremely high wholesale prices during the storm and will alleviate the financial crisis that the ERCOT market is enduring as a result of the PUC's improper action.

33. In addition to being outside the scope of the PUC's authority and procedurally invalid, ERCOT's actions exceeded the mandate in the Commission's Orders, which in and of itself caused additional harm to Plaintiffs/Appellants. In adopting the Orders, the PUC instructed ERCOT to impose an artificial price adder "when we're in load shed,"<sup>17</sup> yet the Commission allowed the adders to remain for approximately 32 hours after load shed ended and refused to correct the prices. This time period may appear brief in the context of the lengthy storm, but every minute truly matters at a \$9,000/MWh price. As calculated by the Independent Market Monitor

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<sup>17</sup> Open Meeting Tr. at 4:8 (Feb. 15, 2021).

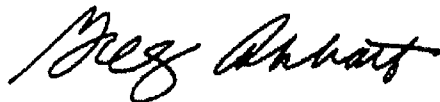
("IMM"), this 32 hours of artificially high pricing alone resulted in over-priced energy in ERCOT's market by \$16 billion.<sup>18</sup>

34. This disruption in the market, caused not by competitive forces, but by unauthorized Commissioner actions, motivated the Governor to issue a message to the Legislature making repricing an emergency matter:

I, GREG ABBOTT, Governor of the State of Texas, pursuant to Article III, Section 5, of the Texas Constitution and by this special message, do hereby submit the following emergency matters for immediate consideration to the Senate and House of Representatives of the 87th Legislature, now convened:

Legislation relating to the correction of any billing errors by the Electric Reliability Council of Texas (ERCOT), including any inaccurate excessive charges and any issues regarding ancillary service prices.

Respectfully submitted,



GREG ABBOTT  
Governor

19

35. Twenty-eight of the thirty-one Texas Senators, representing both political parties, signed a letter to the Commission urging the correction of the charges for those 32 hours.<sup>20</sup> Texas

<sup>18</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Potomac Economics' Follow Up Letter (Mar. 11, 2021).

<sup>19</sup> Emergency Message of to the Senate and House of Representatives, Governor Greg Abbott (Mar. 9, 2021) *available at* [https://gov.texas.gov/uploads/files/press/EMERG\\_MESSAGE\\_legislative\\_matter\\_repricing\\_electricity\\_FINAL\\_03-09-21.pdf](https://gov.texas.gov/uploads/files/press/EMERG_MESSAGE_legislative_matter_repricing_electricity_FINAL_03-09-21.pdf).

<sup>20</sup> Letter to Chairman D'Andrea (Mar. 9, 2021) (signed by Sen. Carol Alvarado, Sen. Paul Bettencourt, Sen. Brian Birdwell, Sen. Cesar Blanco, Sen. Dawn Buckingham, MD, Sen. Donna Campbell, MD, Sen. Roland Gutierrez, Sen. Bob Hall, Sen. Juan "Chuy" Hinojosa, Sen. Joan Huffman, Sen. Bryan Hughes, Sen. Nathan Johnson, Sen. Lois Kolkhorst, Sen. Eddie Lucio, Jr., Sen. Jose Menendez, Sen. Borris Miles, Sen. Jane Nelson, Sen. Robert Nichols, Sen.



Representatives also sent letters to the Commission asking that they reverse their pricing order, in whole or in part, or to direct ERCOT to cease from sending out bills until the situation could be addressed.<sup>21</sup>

## **B. Background**

36. Prior to the winter storm, Texas Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in the state, pursuant to Texas Gov't Code § 418.014.<sup>22</sup> Subsequently, on February 15, 2021, following ERCOT's declaration of its highest state of emergency, an Emergency Energy Alert Level 3 ("EEA3"), and ordering firm load shed, when the application of ERCOT's rules nonetheless led to wholesale prices below the \$9,000 per MWh price cap, the PUC issued the first of the Orders directing ERCOT to ensure that firm load shed in EEA3 was being accounted for in ERCOT's scarcity pricing signals both prospectively and retroactively during the storm.<sup>23</sup> The order also directed ERCOT to suspend the use of the low system-wide offer cap ("LCAP") until the PUC's next regularly scheduled open meeting and to use the high system-wide offer cap ("HCAP") of \$9,000/MWh as the system-wide offer cap.<sup>24</sup> On February 16, 2021, the PUC issued a second order directing ERCOT to take these same actions,

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Angela Paxton, Sen. Charles Perry, Sen. Beverly Powell, Sen. Charles Schwertner, MD, Sen. Kel Seliger, Sen. Drew Springer, Sen. Larry Taylor, Sen. Royce West, Sen. John Whitmire, and Sen. Judith Zaffirini) (reported in *Texas Governor, State Senate Call for Reversal of \$16 Billion Power Overcharges*, Wall Street Journal (Mar. 10, 2021), available at [<sup>21</sup> See Letters to the PUC, Docket No. 51812, available at <http://interchange.puc.texas.gov/search/filings/?UtilityType=A&ControlNumber=51812&ItemMatch=Equal&DocumentType=ALL&SortOrder=Ascending>.](https://www.wsj.com/articles/texas-governor-state-senate-call-for-reversal-of-16-billion-power-overcharges-11615352413#:~:text=On%20Tuesday%20night%2C%2028%20Texas,ERCOT%2C%E2%80%9D%20the%20letter%20read); see also Senate Tells Utility Commission to Fix Billion Dollar Pricing Error, Texas Senate News (Mar. 15, 2021), available at https://senate.texas.gov/news.php?id=20210315a.</a></p></div><div data-bbox=)

<sup>22</sup> Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, available at <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

<sup>23</sup> See Exs. A, C, and D.

<sup>24</sup> *Id.*

but rescinding their directive to ERCOT related to correcting certain retroactive prices.<sup>25</sup> As a result of the PUC's Orders, ERCOT set Real Time energy prices at the \$9,000/MWh HCAP for approximately four days.

37. Importantly, neither the PUC's rules nor ERCOT's rules (known as "protocols") include load shed as a trigger in ERCOT's scarcity pricing mechanism or a factor in HCAP pricing. To the contrary, load shed was considered as a factor to include when the rules were originally adopted through the ERCOT stakeholder process, but specifically rejected as a factor that would be included.

38. As with many market participants, Plaintiffs/Appellants suffered substantial financial harm as a result of the protracted administrative imposition of wholesale prices at the \$9,000 per MWh HCAP. Plaintiffs/Appellants are leading international providers of energy with a large Texas commitment. Plaintiffs/Appellants own and operate numerous generation projects throughout Texas, a combination of wind and solar, natural gas, and associated energy storage projects all within ERCOT with additional projects currently under construction within ERCOT. Plaintiffs/Appellants have made a significant investment in Texas and are committed to a thriving Texas electric system. Plaintiffs/Appellants face additional financial harm since the artificially high ERCOT prices directly led to artificially high financial obligations on Plaintiffs/Appellants to counterparties with contractual rights related to their generation resources during the period at issue.

39. The PUC exceeded its authority and failed to comply with necessary procedural processes in issuing the Orders. As each day passes, the ability to upright the market becomes

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<sup>25</sup> See Exs. B, C, and D.

more and more difficult. As other market participants fail to pay for wholesale energy or seek protection in bankruptcy court, the threat of additional financial harm to Plaintiffs/Appellants and others looms large.

### C. Summary of Legal Challenges

40. The PUC is responsible for administrating PURA and lawfully adopting and enforcing rules pursuant to the authority granted in PURA. The PUC is also subject to the APA, as it is well established that the APA is generally applicable to “all state agencies” as the process for judicial review of their decisions.<sup>26</sup> In its Orders, the PUC did not clearly delineate the authority under which it was implementing its changes to ERCOT energy prices. Not only did the PUC act without authority by issuing the Orders, even if it had authority, the issuance of the Orders was invalid as a matter of law because the PUC failed to follow any—much less the correct—procedure in promulgating the Orders. The Orders should be reversed by this Court.

41. Plaintiffs/Appellants challenge the Orders under the APA on several grounds. First, the Orders are invalid under PURA section 39.001. Second, the Orders violate the APA in multiple substantive and procedural ways and must be reversed.<sup>27</sup> The APA’s stated purpose is to “provide minimum standards of uniform practice and procedure for state agencies,” including the PUC.<sup>28</sup> It governs both adjudication and rulemaking. Pursuant to Tex. Gov’t Code § 2001.003(1), adjudication occurs when “legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.” Rulemaking, on the other hand, is

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<sup>26</sup> See *Mosley v. Tex. HHS Comm’n*, 593 S.W.3d 250, 259 (Tex. 2019); see also *Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008) (finding that “[u]nless otherwise provided, the APA’s contested-case and judicial-review procedures apply to agency-governed proceedings.”).

<sup>27</sup> Tex. Gov’t Code §§ 2001.001–.902.

<sup>28</sup> *Id.* at § 2001.001(1).

required for any “agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency.”<sup>29</sup> Regardless of how the Court (and PUC) choose to categorize the Orders, the PUC’s actions exceeded its statutory authority and violated the mandatory procedures for a contested case, rulemaking, or emergency rulemaking as set forth in the APA. Therefore, the PUC erred by issuing the Orders.

42. Additionally, the Orders offend Plaintiffs/Appellants’ rights to due process and are arbitrary and capricious and failed to procedurally conform with the requirements of the Governor’s Disaster Declaration.

43. For these reasons, the Orders are voidable and should be reversed pursuant to Texas Government Code sections 2001.035, 2001.038, 2001.171, and 2001.174. There is no exception under the APA that would enable the PUC’s actions here. As the Texas Supreme Court has stated, “[w]hatever an agency’s authority . . . it cannot extend to contravening the APA’s express requirements. . . It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements.”<sup>30</sup>

44. Additionally or alternatively, Plaintiffs/Appellants are entitled to a declaratory judgment establishing that the Orders are invalid, and the Commission and the Commissioners acted *ultra vires* and outside the scope of their legal authority in promulgating the Orders and/or allowing ERCOT to exceed the Orders and refusing to correct certain pricing.

45. And separately and alternatively, Plaintiffs/Appellants are entitled to a writ of mandamus or injunction directing the Commission and Commissioners D’Andrea, McAdams, and

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<sup>29</sup> *Id.* at § 2001.003(6).

<sup>30</sup> *Mosley*, 593 S.W.3d at 261.

Doe to withdraw the Orders. Finally, in the further alternative, Plaintiffs/Appellants seek a writ of mandamus or injunction directing the Commission and the Commissioners to properly correct pricing outside the scope of the Orders.

## VIII. CAUSES OF ACTION

**Count 1 – The Commission’s Orders Fall Outside of the PUC’s Scope of Authority Granted in PURA, are a Violation of PURA § 39.001, and should be reversed pursuant to APA, regardless of whether the Orders are characterized as a “contested case” or rule-making.**

46. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

47. As a general rule, an administrative agency is a creation of the legislature, and thus, “only has the powers expressly conferred and those necessary to accomplish its duties.”<sup>31</sup> To determine whether the PUC acted appropriately within the scope of its authority under PURA, the [PUC]’s actions must be evaluated within their grant of authority.<sup>32</sup> Chapter 39 of PURA was enacted to “protect the public interest during the transition to and in the establishment of a fully competitive electric power industry.”<sup>33</sup> The statute expressly limits an agency’s ability to regulate pricing, stating that “electric services and their prices should be determined by customer choices and the normal forces of competition.”<sup>34</sup> It also states that “regulatory authorities . . . may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title” and that they “shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter

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<sup>31</sup> *State v. Public Util. Comm’n*, 883 S.W.2d 190, 194 (Tex. 1994).

<sup>32</sup> *Id.*; Tex. Gov’t Code § 2001.174.

<sup>33</sup> Tex. Util. Code § 39.001(a).

<sup>34</sup> *Id.* at § 39.001(a).

to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition.”<sup>35</sup>

48. In deciding to set the entire ERCOT wholesale power market at the maximum amount permissible of \$9,000/MWh, the PUC violated these explicit instructions: it did not follow the “normal forces of competition” when establishing pricing. The PUC’s actions were also a violation of the directive not to make rules or issue orders regulating prices.

49. The PUC cites to PURA § 39.151(d)<sup>36</sup> as a purported source of authority, stating that the PUC has “complete authority” over ERCOT. The plain text of that provision directly undermines the PUC’s position. The full sentence granting the PUC authority reads: “The [PUC] has complete authority to oversee and investigate the organization’s finances, budget, and operations as necessary to ensure the organization’s accountability and to ensure that the organization adequately performs the organization’s functions and duties.”<sup>37</sup> The scope of the PUC’s authority is limited to “oversee[ing] and investigat[ing]” ERCOT’s finances, budget and operations, not to *carte blanche* modify rules and ERCOT protocols, or unilaterally change ERCOT’s prices or rules that calculate those prices. And, again, the PUC has no power beyond that expressly granted.<sup>38</sup> The PUC’s delineation of authority from PURA does not encompass the ability to arbitrarily modify rules and ERCOT protocols, and change prices. The PUC may not

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<sup>35</sup> *Id.* at § 39.001(c), (d).

<sup>36</sup> The Orders also cite to 16 TAC § 25.501. However, while this rule allows the Commission to initiate certain pricing procedures, it does not provide an avenue for the Commission to unilaterally modify pricing without proper notice under PURA, the APA, or the Governor’s Disaster Declaration.

<sup>37</sup> Tex. Util. Code § 39.151(d).

<sup>38</sup> *PUC of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001) (citing *Public Util. Comm’n v. GTE-Southwest*, 901 S.W.2d 401, 406 (Tex. 1995)).

confer onto itself greater authority than what was prescribed by the Texas Legislature and to act with authority it does not possess.<sup>39</sup>

50. The PUC's Orders directly violate the statutory requirements of PURA, are opposed to the statute's general objectives, and imposed significant conditions and burdens on the electric market during a time of crisis. As a result, the Orders are voidable in contravention of the requirements set forth in PURA, and the PUC clearly erred in issuing the Orders. Regardless of whether the Orders are characterized as arising in a "contested case" or under the PUC's rule-making authority, as described below, the Orders should be held void and reversed as a matter of law under APA sections 2001.035, 2001.038, 2001.171 and 2001.174.

**Count 2 –Substantive and Procedural Challenge Pursuant to APA, Tex. Gov't Code §§ 2001.171 and 2001.174**

51. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

52. Reversal is required because the PUC erred by issuing the Orders outside its substantive authority and outside the mandatory procedures set forth in the APA.

53. A contested case is defined under the APA as "a proceeding, including a ratemaking, a licensing proceeding, which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."<sup>40</sup> In a contested case, each party is entitled to an opportunity "for hearing after reasonable notice of not less than 10 days" and "to respond and to present evidence and argument on each issue involved in the case."<sup>41</sup>

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<sup>39</sup> *GTE-Southwest*, 901 S.W.2d at 406.

<sup>40</sup> Tex. Gov't Code § 2001.003(1). In this context, a motion for rehearing must be filed no later than the 25th day after the date the decision or order that is the subject of the motion is signed. Tex. Gov't Code § 2001.146(a). As set forth above, Plaintiffs/Appellants filed the requisite motions for rehearing.

<sup>41</sup> *Id* at § 2001.051.

54. Here, to the extent the PUC proceedings adopting the Orders are found to be “contested case” proceedings, the PUC did not comply with requisite procedures. The market participants impacted by the PUC’s orders were not given notice of the energy pricing changes and did not have the opportunity to respond or provide comments to the PUC before it was effective.

55. Not only were the requirements of notice and a hearing not satisfied with these Orders, but the PUC also failed to follow rules for final decisions and orders required by the APA. In particular, a decision or order is required to include “findings and fact and conclusions of law, separately stated.”<sup>42</sup> Additionally, the findings of fact “may only be based on the evidence and on matters that are officially noticed.”<sup>43</sup> In this circumstance, the PUC failed to comply with any of these requirements through its Orders. The PUC’s Orders violate the statutory requirements as set forth in the APA and were issued as a result of prohibited procedure and, accordingly, constitute reversible error as a matter of law.

56. In addition to the forgoing, and as discussed above, *supra* ¶¶ 46-50, Plaintiffs/Appellants are entitled to judicial review and reversal under section 15.001 of the Texas Utilities Code and section 2001.174 of the Texas Government Code as a result of the PUC’s substantive legal errors in promulgating the Orders. PURA and the APA permit review—and require reversal—of improper agency final orders. Tex. Gov’t Code §§ 2001.0174, 15.001; *Gen. Tel. Co. of the Sw. v. Pub. Util. Comm’n of Tex.*, 628 S.W.2d 832, 843 (Tex. App.—Austin 1982, writ ref’d n.r.e.) (citing *Sw. Bell Tel. Co. v. Pub. Util. Comm’n*, 571 S.W.2d 503, 512 (Tex. 1978)).

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<sup>42</sup> *Id* at § 2001.141(b).

<sup>43</sup> *Id* at § 2001.141(c).



57. Section 2001.174 explains that the Court “*shall* reverse” when, as here, any of the below-listed circumstances (in Part (2)) exist, such as when the action is in excess of the agency’s authority, when it violates a statutory provision, when it is made through an unlawful procedure, or when it is affected by an error of law or is arbitrary and capricious:

JUDICIAL REVIEW.

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) *shall reverse* or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
  - (A) in violation of a constitutional or statutory provision;
  - (B) in excess of the agency’s statutory authority;
  - (C) made through unlawful procedure;
  - (D) affected by other error of law;
  - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
  - (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (emphasis added).

58. Here, *all* of the “shall reverse” occasions listed in (2)(A)-(F) apply, requiring reversal. The Court need only find that one applies to reverse the Orders.

59. The Orders were made in violation of statutory and constitutional provisions (and violated Plaintiffs/Appellants’ due process rights); they were made in excess of the PUC’s authority; they were made through unlawful procedures; they were affected by errors of law; they are not reasonably supported by substantial evidence; and they are arbitrary and capricious and an abuse of discretion.

60. As explained above, the PUC acted outside the authority granted in PURA in promulgating the Orders. *Supra* ¶¶ 46-50. The PUC lacked authority to issue the Orders.

61. Additionally, the PUC issued the Orders in violation of a statutory provision and the PUC's statutory authority and through unlawful procedure. Tex. Gov't Code § 2001.174(A)-(C). The Commission failed to provide Plaintiffs/Appellants with (1) a hearing, (2) the opportunity to present evidence and argument on each issue in the case, and (3) adequate notice. *Id.* §§ 2001.051-052. The Orders are not supported by substantial evidence. *Id.* § 2001.174(E). The Commission also failed to establish an adequate record in support of its decision, *id.* § 2001.060, failed to follow the APA's decisional timelines, *id.* § 2001.143, and failed to issue "findings of fact and conclusions of law, separately stated" and that were "based on evidence and on matters that [were] officially noticed", *id.* § 2001.141(b), (c).

62. The PUC's Orders violate Plaintiffs/Appellants' due process rights. *Id.* § 2001.174(A). Due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted). The Commission provided no notice or opportunity to be heard before promulgating the Orders.

63. The Orders are also arbitrary and capricious. They are untethered to the problem at stake and fail to account for the impact they would have on Plaintiffs/Appellants and similarly situated parties. Tex. Gov't Code § 2001.174(F). In issuing the Orders, the Commission did not consider the likely impact on Plaintiffs/Appellants and other similarly situated market participants.

64. Additionally, the Orders are affected by errors of law. The Orders cite to Texas Governor Greg Abbott's Disaster Declaration as if it were a basis for the Orders, but that basis also fails as improper. *Id.* § 2001.174(D). The declaration did not provide a basis for issuing the

Orders, nor could it excuse the violations set forth above. As previously discussed, in light of the winter storm and expected sub-freezing temperatures, the Governor issued a disaster declaration of all counties in the state of Texas.<sup>44</sup> Under Texas Government Code section 418.014, the Governor is permitted to issue a state of disaster if “the occurrence or threat of disaster is imminent.” In his Order, the Governor stated, in pertinent part:

“[A]ny regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor.”<sup>45</sup>

65. The PUC merely referenced the Governor’s Disaster Declaration, but it did not provide a legal basis for the Commission’s actions. Again, the PUC lacked authority for its Orders. And even if the PUC believed its actions were somehow authorized under the Governor’s Disaster Declaration, the PUC failed to obtain written approval from the Governor’s office before implementing the Orders. As a result, market participants were given little to no notice of the energy pricing changes. The Governor’s Disaster Declaration requires written approval before deviating from ERCOT protocols or any of the rules of a state agency, and the PUC’s failure to obtain this approval constitutes reversible error.

66. The Governor’s Disaster Declaration allows for the “suspension” of certain rules that may hinder necessary action—it does not allow the PUC to modify ERCOT’s rules to set mandatory price adders for a four day period, as the Orders did here. Accordingly, even if the Governor’s Disaster Declaration gave the PUC some authority to act, which it did not, the PUC

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<sup>44</sup> Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

<sup>45</sup> *Id*

still had to comply with the terms of the declaration. It did not, but rather, acted far outside any potential authority. By so acting, the PUC erred and exceeded its authority, and accordingly, the Orders should be reversed, as set forth above.

67. Finally, because the Commission allowed ERCOT to exceed the Orders and refused to correct pricing after load shed ceased, *see infra* ¶¶ 102, 111-112, the Orders are voidable and should be reversed.

68. *De novo* review applies to the questions of law at issue in this inquiry because questions of law—including questions of textual interpretation of statutes and rules—are reviewed *de novo* by the Court. *RR. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011); *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *State of Tex. v. Pub. Util. Comm’n of Tex.*, 246 S.W.3d 324, 332 (Tex. App.—Austin 2008, pet. denied).

69. When reviewing questions of textual interpretation, courts apply the plain terms of the statute or rule. *State of Tex.*, 246 S.W.3d at 332; *see also Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Deference is not due to an agency’s interpretation that is inconsistent with unambiguous plain text. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 43 (Tex. 2011) (“We defer only to the extent that the agency’s interpretation is reasonable, and no deference is due where an agency’s interpretation fails to follow the clear, unambiguous language of its own regulations.”).

70. Accordingly, the Orders constitute reversible error as a matter of law. *Id.* § 2001.174.

### Count 3 - Improper Rulemaking Challenge

71. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

72. Alternatively, the PUC's Orders must be set aside because they amount to the promulgation of rules outside of the PUC's authority and of the procedures necessary to make those rules. Tex. Gov't Code §§ 2001.035(a), .038. The PUC erred in improperly adopting the rules set forth in the Orders.

73. As previously stated, in its Orders, the PUC did not clearly delineate the authority under which it was acting. However, the scope of the Commission's authority to act within the competitive power market is limited to only a few types of agency proceedings: "Unless specifically provided otherwise, each commission proceeding under [Chapter 39 of PURA], other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case." Further, it is well-established that when agency actions do not fit squarely into the groupings of "contested cases" or "rulemakings," the courts look to the effect of the agency actions and the definitions provided within the APA to determine how to best categorize them for purposes of appeals and reconsideration.<sup>46</sup> The APA states that the term "rule" refers to:

- (A) a state agency statement of general applicability that:
  - (i) implements, interprets, or prescribes law or policy; or
  - (ii) describes the procedure or practice requirements of a state agency
- (B) includes the amendment or repeal of a prior rule; and

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<sup>46</sup> See e.g., *Teladoc, Inc v. Tex. Med. Bd.*, 453 S.W.3d 606, 621 (Tex. App.—Austin 2014) (finding that an agency action through an "informal" written agency pronouncement regarding law or policy was a "rule" under the APA); *El Paso Hosp. Dist. v. Tex. HHS Comm'n*, 247 S.W.3d 709 (Tex. 2008) (finding that an agency statement was a rule because it was an interpretation of its formally promulgated rules that was not found in the text of the existing rules)

- (C) does not include a statement regarding internal management or organization of a state agency and not affecting private rights or procedures.<sup>47</sup>

74. Agency actions that fall into the definition of a “rule” are treated as a rulemaking. In circumstances where an agency action was determined to be a rulemaking, the courts analyze whether the APA’s procedures for a rulemaking were properly followed.<sup>48</sup>

75. “A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034.” *See* APA, Tex. Gov’t Code § 2001.035(a).<sup>49</sup>

76. Here, to the extent the agency action is deemed a rulemaking, the PUC did not act in substantial compliance with the relevant provisions, and it did not comply with rulemaking procedures and requirements. For instance, the APA requires that when the PUC initiates a rulemaking on its own motion, it must give notice of the proposed rule at least 30 days before the rule is adopted and the proposed rule must be published in the *Texas Register*.<sup>50</sup> Further, before adopting a rule, the PUC must “give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing” and must grant an opportunity for a public hearing if requested by at least 25 persons, a governmental subdivision or agency, or an association with at least 25 members.<sup>51</sup> These rulemaking procedures are designed to maximize “public participation in the rulemaking process,” set forth as the stated purpose for the APA.<sup>52</sup>

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<sup>47</sup> Tex. Gov’t Code § 2001.003(6).

<sup>48</sup> *See e.g., Teladoc, Inc.*, 453 S.W.3d 606; *El Paso Hosp. Dist.*, 247 S.W.3d 709; *Tex. State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014); *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009).

<sup>49</sup> A party must “initiate a proceeding to contest a rule of noncompliance with the procedural requirements of Sections 2001.0225 through 2001.034 no later than the second anniversary of the effective date of the rule.” *See* APA, Tex. Gov’t Code § 2001.035(b).

<sup>50</sup> *Id.* at § 2001.023.

<sup>51</sup> *Id.* at § 2000.029.

<sup>52</sup> *Id.* at §§ 2001.021–.041.

77. The PUC's Orders did not follow any of the notice and hearing requirements, derailing the APA's allowance of public participation in rulemakings.

78. Additionally, and as described above, *supra* ¶¶ 46-50, 64-66, the PUC violated the substantive commands of PURA and acted well outside the authority granted in and the procedural scope of the Governor's Disaster Declaration in promulgating the Orders. The PUC also deprived Plaintiffs/Appellants of due process and acted arbitrarily and capriciously in issuing the Orders. *Supra* ¶¶ 62-63.

79. Accordingly, the Orders are voidable, the PUC erred in issuing them, and/or they should be reversed. In circumstances where rules are improperly adopted, courts have declared the corresponding rules void and remanded the issues back to the agency.<sup>53</sup>

#### **Count 4 - Improper Emergency Rulemaking Challenge**

80. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

81. Alternatively, should the PUC attempt to classify the Orders as an emergency rulemaking, it still failed to operate within its authority and according to the requisite process; the rules thus are voidable (and reversible) for this reason as well.

82. In certain limited circumstances, the APA provides that an agency may enact emergency rulemaking. If the Court were to view the Orders under the rubric of emergency rulemaking, the PUC still failed to act within its authority or to comply with required procedures.<sup>54</sup>

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<sup>53</sup> See e.g., *Teladoc*, 453 S.W.3d 606; *El Paso Hosp. Dist.*, 247 S.W.3d 709; *Witcher*, 447 S.W.3d 520; *Entm't Publ'ns, Inc.*, 292 S.W.3d 712.

<sup>54</sup> See Tex. Gov't Code § 2001.035(b).

83. Given the possible implications of a rulemaking that is not vetted through the typical notice and hearing process, the APA sets forth specific requirements for emergency rulemakings. In particular, the APA permits a state agency to adopt an emergency rule without prior notice or hearing if the agency:

- (1) finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice; and
- (2) states in writing the reasons for its finding under Subdivision (1).<sup>55</sup>

84. However, the APA requires that this finding be in the emergency rule's preamble: "A state agency shall set forth in an emergency rule's preamble the finding required by Subsection (a)."<sup>56</sup> The APA also requires that the agency file the rule with the secretary of state for publication in the *Texas Register*.<sup>57</sup> Here, the PUC did not comply with any of these requirements. For example, it did not make the finding that the Orders were required due to "imminent peril to the public health, safety, or welfare." It did not properly set forth such a finding. It did not even publish the Orders in the *Texas Register*.

85. Pursuant to section 2001.035(a) of the APA, a rule "is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034." The phrase "substantial compliance" is defined to mean that "the agency's reasoned justification demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective."<sup>58</sup> The changes to ERCOT pricing and protocols mandated by the PUC's

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<sup>55</sup> *Id.* at § 2001.034(a).

<sup>56</sup> *Id.* at § 2001.034(b).

<sup>57</sup> *Id.* at § 2001.034(b), (d).

<sup>58</sup> *Id.* at § 2001.035(c).



Orders do not meet the substantial compliance standard and should be held void and reversed on those grounds as well.

86. Moreover, the PUC violated PURA and any authority granted in, as well as the procedural terms of, the Governor's disaster declaration in issuing the Orders. *Supra* ¶¶ 46-50. The PUC also deprived Plaintiffs/Appellants of due process and acted arbitrarily and capriciously in issuing the Orders. *Supra* ¶¶ 62-63.

87. Put differently, even if the PUC could have issued some emergency order during the February 2021 storm, it was still required to act within its substantive authority and comply with the mandatory procedures for emergency rulemaking. Because the PUC failed to do so as described herein, the Orders are also reversible error on that basis.

**Count 5 – Declaratory Judgment Under the APA Sections 2001.035 and .038**

88. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

89. In the alternative (or additionally), the Court should grant a declaratory judgment holding that the Orders are void and invalid. There are several independent bases on which the Court should grant declaratory judgment in Plaintiffs/Appellants' favor, any of which alone is sufficient.

90. *First*, Texas Government Code Section 2001.035 provides that a rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.025 through 2001.034.

91. As explained, to the extent the Orders are deemed to have promulgated rules, the Commission violated the APA's mandatory provisions for the adoption of agency rules, including those that govern emergency rules. The Commission did not substantially comply with the APA's requirements. Even an emergency rule requires, among other things, stating in writing the reasons

for findings regarding imminent peril, and filing the rule with the Secretary of State. No such steps were undertaken in this instance. *See supra* ¶¶ 76-77, 84-85 (explaining the Commission’s multiple violations of the rule-making procedure). Because the Commission failed to substantially comply with the APA’s procedural requirements, the Orders are voidable. Tex. Gov’t Code § 2001.035(a).

92. *Second*, as explained above, *supra* ¶¶ 46-50, 64-66, the PUC violated its substantive authority under PURA and any substantive authority and procedural limitations of the Governor’s Disaster Declaration in issuing the Orders. It both acted outside of its authority and contrary to requisite procedures.

93. *Third*, because the Commission allowed ERCOT to exceed the Orders and refused to correct pricing, *see infra* ¶¶ 102, 111-12, the Orders are voidable and should be reversed.

94. *Fourth*, Texas Government Code section 2001.0038 provides that the validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the Plaintiffs/Appellants. Under this provision, too, the Court should hold the Orders invalid.

95. The Orders (and to the extent they are deemed to contain rules) are invalid because they interfere with or impair, or threaten to interfere with or impair, a legal right or privilege belonging to Plaintiffs/Appellants. Tex. Gov’t Code § 2001.038(a).

96. Plaintiffs/Appellants suffered substantial financial losses—and serious interference and impairment—as a result of the PUC’s improper action. As set forth above, Plaintiffs/Appellants own and operate numerous generation projects throughout Texas, a combination of wind and solar, natural gas, and associated energy storage projects all within

ERCOT with additional projects currently under construction within ERCOT. Plaintiffs/Appellants had no voice in the Orders and no opportunity to raise their perspective or to mitigate the harm that they would soon suffer.

**Count 6 – *Ultra Vires* Claim Under the Uniform Declaratory Judgments Act;  
Issuance of the Orders**

97. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

98. The Uniform Declaratory Judgments Act permits an *ultra vires* cause of action for prospective relief against a state official in an official capacity when the official acts outside the scope of his or her legal authority. *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011); *Heinrich*, 284 S.W.3d at 372; *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (“Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority.”); Tex. Civ. Prac. & Rem. Code § 37.006(b). As described herein, Commissioners D’Andrea, McAdams, and Doe acted without legal authority in promulgating the Orders. *Supra* ¶¶ 46-67, 72-96. Plaintiffs/Appellants are entitled to declaratory relief.

99. As described herein, alternatively or additionally, the Commissioners acted without their legal authority and failed to perform ministerial acts. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-72 (Tex. 2009). The Commissioners’ illegal and unauthorized acts were not acts of the State. *Id.* Plaintiffs/Appellants’ claim for declaratory relief under the Uniform Declaratory Judgments Act is not a suit to alter governmental policy, but to enforce governmental policy, and therefore is not barred by the State’s sovereign immunity. *Id.*

100. For all of these reasons, the Orders should be declared invalid as an *ultra vires* act of Commissioners D’Andrea, McAdams, and Doe.

**Count 7 – *Ultra Vires* Claim Under the Uniform Declaratory Judgments Act;  
Failure to Correct Prices**

101. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

102. Alternatively, the Commissioners D’Andrea, McAdams, and Doe acted *ultra vires* and outside the scope of their legal authority in allowing ERCOT to exceed the Orders and refusing to correct pricing after ERCOT ceased load shed. ERCOT ceased firm load shed at 11:55 p.m. on February 17, 2021, but kept \$9,000/MWh prices in place until 9 a.m. on Friday, February 19. Accordingly, the Commissioners acted without legal authority, and thus have engaged in *ultra vires* acts. *Supra* ¶¶ 46-67, 72-96. Plaintiffs/Appellants request a declaratory order that the continuance of the \$9,000/MWh prices after load shed ended exceeded the authority, if any, of Commission’s Order and the Commissioners acted outside the scope of their legal authority, failed to comply with their own invalid Orders, and failed to follow requisite procedures in allowing ERCOT to exceed the Orders and refusing to correct pricing.

**Count 8 - Request for Writ of Mandamus or Injunction to Vacate the Voidable Orders**

103. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

104. In the alternative, Plaintiffs/Appellants are entitled to a writ of mandamus or an injunction requiring the Commission and Commissioners D’Andrea, McAdams, and Doe to rescind the Orders. The Commission, acting through its Commissioners, may exercise “only those powers that the Legislature confers upon it in clear and express language, and cannot erect and

exercise what really amounts to a new or additional power for the purpose of administrative expediency.” *Tex. Nat. Res. Conservation Comm’n v Lakeshore Util. Co.*, 164 S.W.3d 368, 377 (Tex. 2005); *Harris Cty. Appraisal Dist. v. Texas Workforce Comm’n*, 519 S.W.3d 113, 130 (Tex. 2017) (“Administrative agencies are statutory creatures of the Legislature with no inherent authority of their own. Any power an agency has is directly conferred by the Legislature.”). The Orders were issued without any authority. *Supra* ¶¶ 46-67, 72-96. Any PUC order issued without authority is void. *Pub. Util. Comm’n of Tex. v. Brazos Elec. Power Co-op., Inc.*, 723 S.W.2d 171, 172 (Tex. App.—Austin 1986, writ refused n.r.e.). By issuing the void Orders, the Commission and the Commissioners acted outside their legal authority and abused their discretion.

105. The APA governs the types of actions that agencies and their officials can perform. The Commission and the Commissioners failed to follow the APA’s mandatory requirements, including all the requirements described above. *Supra* ¶¶ 51-96.

106. The Commission’s and the Commissioners’ refusal to comply with statutory authority and with proper rule-making procedures renders the Orders invalid. *El Paso Hosp. Dist. v. Texas Health & Hum. Servs. Comm’n*, 247 S.W.3d 709, 715 (Tex. 2008) (“When an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid.”). Mandamus is appropriate where orders are void, as the Orders are here. *In re Office of Attorney Gen.*, 257 S.W.3d 695, 697 (Tex. 2008) (“Because we agree that the orders are void for failure to comply with mandatory procedural requirements, we conditionally grant the writ.”).

107. Additionally, the Orders are void as a matter of law, and mandamus is permissible without a showing that Plaintiffs/Appellants lack an adequate remedy by appeal. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (noting that a mandamus relator need not show an inadequate appellate remedy to obtain mandamus relief from a void order) (recognizing that

application of a void agency order will cause irreparable injury) (citing *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998).

108. In any event, Plaintiffs/Appellants lack an adequate remedy by appeal. The ordinary appellate process cannot make Plaintiffs/Appellants or those similarly situated whole because too much damage and change will have occurred in the meantime. “[E]ven an accelerated appeal would be inadequate because of the need for an expeditious decision.” *In re Tex. Nat. Res. Conservation Comm’n*, 85 S.W.3d 201, 205-07 (Tex. 2002).

109. Because the Commission’s orders are void, mandamus relief is appropriate. *Henry v. Cox*, 520 S.W.3d 2, 34-36 (Tex. 2017); *Vondy v. Commissioners Court of Uvalde Cty.*, 62 S.W.2d 104, 107-08 (Tex. 1981); *In re Office of Attorney Gen.*, 257 S.W.3d 695, 697 (Tex. 2008) (“Because we agree that the orders are void for failure to comply with mandatory procedural requirements, we conditionally grant the writ.”). The Court should issue mandamus directing the Commission, acting through its Commissioners, to withdraw the Orders.

**Count 9 - Request for Writ of Mandamus or Injunction to Require Commission and the Commissioners to Direct ERCOT to Correct Pricing**

110. Plaintiffs/Appellants re-allege all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

111. In the alternative, at the very minimum, Plaintiffs/Appellants seek an order requiring the Commission and the Commissioners to direct ERCOT to correct pricing for any time that ERCOT was not in load shed. Not only are the Orders reversible for the reasons described herein, but ERCOT also continued imposing \$9,000/MWh prices even after load shed ended. ERCOT ceased firm load shed at 11:55 p.m. on February 17, 2021, but continued imposing \$9,000/MWh prices until 9 a.m. on Friday, February 19.

112. ERCOT's unlawful actions caused market participants to incur an additional, unwarranted, estimated \$16 billion. The Commissioners have a ministerial duty to enforce the Commission's orders. Despite numerous appeals, the Commission, acting through its Commissioners, has thus far refused to direct ERCOT to correct ERCOT's mistake.

113. "A writ of mandamus will issue to compel a public official to perform a ministerial act." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991); *Janek v. Harlingen Fam. Dentistry, P.C.*, 451 S.W.3d 97, 101 (Tex. App.—Austin 2014, no pet.). An agency has a ministerial duty to enforce its own orders; failure to do so is grounds for mandamus. *Janek*, 451 S.W.3d at 104; *see also Dallas Cty. v. Halsey*, 87 S.W.3d 552, 557 (Tex. 2002) ("[A]ctions which require obedience to orders are . . . ministerial.") (internal quotation omitted). Similarly, a plaintiff seeking a permanent injunction must plead and prove: (1) a cause of action against the defendant and a probable right to the relief sought; (2) a probable and imminent injury; and (3) an irreparable injury or inadequate remedy at law. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554 (Tex. 2019); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009); *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 110-11 (Tex. 2001); *Lazarides v. Farris*, 367 S.W.3d 788, 803 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that "to obtain a permanent injunction, [plaintiff] must plead and prove, among other things, the existence of imminent harm, the existence of irreparable injury, and the absence of an adequate remedy at law).

114. The Commission acted *ultra vires* in contradicting its own orders. Plaintiffs/Appellants have been harmed by the Commission's acts and lack an adequate remedy by appeal. *See In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding) ("In determining whether appeal is an adequate remedy, appellate courts consider whether the benefits outweigh the detriments of mandamus review."). In addition to the billions that have been

erroneously charged to market participants, bankruptcy proceedings are pending, more are likely to be filed soon. Plaintiffs/Appellants face millions of dollars of losses and cannot wait for years for the appellate courts to correct these pricing errors. In these circumstances, “even an accelerated appeal would be inadequate because of the need for an expeditious decision.” *In re Tex. Nat. Res.*, 85 S.W.3d at 205-07.

**IX.**  
**ATTORNEYS’ FEES**

115. Pursuant to PURA § 15.003, Tex. Civ. Prac. & Rem. Code § 37.009, and any other applicable law, Plaintiffs/Appellants request attorneys’ and expert witnesses’ fees and costs.

116. Section 15.003 states:

Sec. 15.003. COSTS AND ATTORNEY'S FEES.

(a) A party represented by counsel who alleges that existing rates are excessive or that rates prescribed by the commission are excessive and who prevails in a proceeding for review of a commission order or decision is entitled in the same action to recover against the regulation fund reasonable fees for attorneys and expert witnesses and other costs for the party's efforts before the commission and the court.

(b) The court shall set the amount of attorney’s fees awarded under Subsection (a).

(c) If a court finds that an action under Section 15.001 or this section was groundless and brought in bad faith and for the purpose of harassment, the court may award reasonable attorney's fees to the defendant public utility.

117. An award of reasonable and necessary attorneys’ fees and expenses to Plaintiffs/Appellants would be equitable and just and is also authorized by Tex. Civ. Prac. & Rem. Code 37.009.



**X.**  
**PRAYER**

For the reasons discussed above, the PUC's Orders are void under the APA because they were issued in derogation of the PUC's statutory authority and procedural obligations and in violation of the Texas Constitution. The Orders were not reasonably supported by substantial evidence, were affected by other legal error, and were arbitrary and capricious. The Orders prejudice Plaintiffs/Appellants' substantial rights. Additionally, the Orders were *ultra vires* acts of the Commissioners and an abuse of discretion. For any and all of these reasons, the PUC's Orders should be reversed, vacated, and ordered withdrawn. Alternatively, the Commission should be ordered to direct ERCOT to correct pricing for any time that ERCOT was not in load shed.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs/Appellants respectfully request that the Public Utility Commission of Texas and Commissioners D'Andrea, McAdams, and Doe be cited to appear and answer herein and that, upon final hearing, the Court enter an order reversing the PUC's Orders, and for such other and further relief, both general and special, at law and in equity, to which Plaintiffs/Appellants may be justly entitled including:

1. Reverse the Commission's February 15 and 16 Orders pursuant to sections 2001.171 and 2001.174 of the APA;
2. Alternatively, issue a declaration pursuant to sections 2001.035 and 2001.038 of the APA declaring that the Commission's February 15 and 16 Orders are invalid rule-making and vacating the Orders;
3. Issue a declaratory judgment that the Commissioners acted *ultra vires* in promulgating the Orders;
4. Alternatively, issue a declaratory judgment that, the Commission and Commissioners acted outside the scope of their legal authority in allowing ERCOT to exceed the Orders and refusing to correct pricing;
5. Issue a writ of mandamus or injunction directing the Commission and the

Commissioners to rescind the February 15 and 16 Orders;

6. Alternatively, issue a writ of mandamus or injunction directing the Commission and the Commissioners to properly implement the Orders by requiring ERCOT to reprice the wholesale market transactions that occurred after load shed ceased;
7. Alternatively, remand this matter to the Commission with instructions to require resettlement under the prior, legally valid rules;
8. Plaintiffs/Appellants' attorneys' and expert witnesses' fees and costs pursuant to PURA § 15.003, Tex. Civ. Prac. & Rem. Code § 37.009, and any other applicable law, and
9. Grant such other and additional relief to which Plaintiffs/Appellants have shown themselves to be entitled.

Dated: April 21, 2021.

Respectfully submitted,

/s/Kurt Kuhn

Kurt Kuhn

State Bar No. 24002433

Lisa Bowlin Hobbs

State Bar No. 24026905

KUHN HOBBS PLLC

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*Attorneys for TX Hereford Wind, LLC;  
Miami Wind I, LLC; Goldthwaite Wind  
Energy LLC; and Ector County Energy  
Center LLC*

# Exhibit A

**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>RELIABILITY COUNCIL OF TEXAS</b>	<b>§</b>	
	<b>§</b>	<b>OF TEXAS</b>

**ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

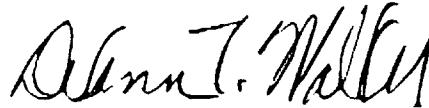
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater of*" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

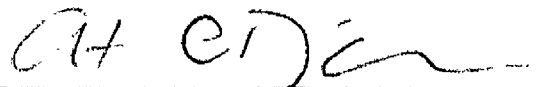
This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15 day of February 2020.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

## Exhibit B



**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>RELIABILITY COUNCIL OF TEXAS</b>	<b>§</b>	
	<b>§</b>	<b>OF TEXAS</b>

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

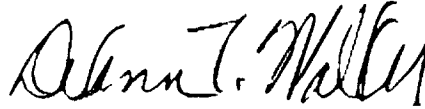
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER

Commissioner Botkin abstains for the portion of this order that rescinds the Commission's directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 and the portion that directs ERCOT to not correct any such past practices. In all other aspects, Commissioner Botkin joins in this Order.



SHELLY BOTKIN, COMMISSIONER

# Exhibit C

DeAnn T. Walker  
Chairman

Arthur C. D'Andrea  
Commissioner

Shelly Botkin  
Commissioner

John Paul Urban  
Executive Director



Greg Abbott  
Governor

## *Public Utility Commission of Texas*

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**TO:** Central Records

**FROM:** Stephen Journeay  
Commission Counsel

**DATE:** February 17, 2021

**RE:** Project 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Commission orders directing action by ERCOT

---

Please file a copy of the following orders issued by the Commission attached to this memorandum in the above referenced project.

Order of February 15, 2021 directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

Order of February 16, 2021 second directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

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**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>RELIABILITY COUNCIL OF TEXAS</b>	<b>§</b>	
	<b>§</b>	<b>OF TEXAS</b>

**ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

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Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

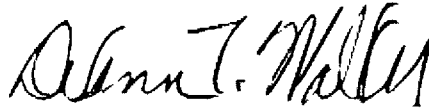
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER



**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>RELIABILITY COUNCIL OF TEXAS</b>	<b>§</b>	
	<b>§</b>	<b>OF TEXAS</b>

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

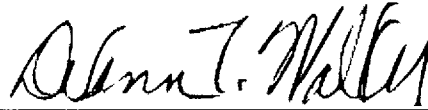
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This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

## Exhibit D

Arthur C. D'Andrea  
Chairman



Greg Abbott  
Governor

RECEIVED  
2021 MAR 22 PM 2:37  
PUBLIC UTILITY COMMISSION  
FILING CLERK

Thomas Gleeson  
Executive Director

*Public Utility Commission of Texas*

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TO: Central Records

FROM: Stephen Journeyay  
Commission Counsel

DATE: March 22, 2021

RE: *Project 51812, Issues Related to the State of Disaster for the February 2021 Winter Weather Event, Corrected Commission order directing action by ERCOT*

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Please file a copy of the following orders issued by the Commission attached to this memorandum in the above referenced project. This corrected version replaces item number 31 filed in the above-referenced project on March 1, 2021.

Order of February 15, 2021 directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

Order of February 16, 2021 second directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

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PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC	§	PUBLIC UTILITY COMMISSION
RELIABILITY COUNCIL OF TEXAS	§	
	§	OF TEXAS

**ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

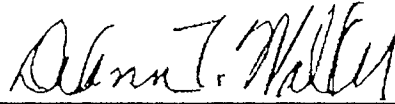
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ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is "the *greater of*" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6)

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15th day of February 2021.


PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER





PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC  
RELIABILITY COUNCIL OF TEXAS

§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

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Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

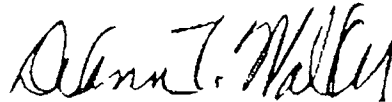
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This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER

Commissioner Botkin abstains for the portion of this order that rescinds the Commission's directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 and the portion that directs ERCOT to not correct any such past practices. In all other aspects, Commissioner Botkin joins in this Order.



SHELLY BOTKIN, COMMISSIONER

## Exhibit E

**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	§	<b>BEFORE THE</b>
	§	
<b>RELIABILITY COUNCIL OF TEXAS</b>	§	<b>PUBLIC UTILITY COMMISSION</b>
	§	
	§	<b>OF TEXAS</b>

**PUC PROJECT NO. 51812**

<b>ISSUES RELATED TO THE STATE</b>	§	<b>PUBLIC UTILITY COMMISSION</b>
<b>OF DISASTER FOR THE FEBRUARY</b>	§	<b>OF TEXAS</b>
<b>2021 WINTER WEATHER EVENT</b>	§	

**RWE RENEWABLES AMERICAS LLC’S MOTION FOR REHEARING**

COMES NOW, RWE Renewables Americas LLC and its affiliates (“RWE”) and submits this Motion for Rehearing of the Public Utility Commission of Texas’ (the “Commission” or “PUC”) Orders dated February 15 and 16, 2021 (the “Orders”) filed in Project Nos. 51617 and 51812,<sup>1</sup> included hereto as Exhibit “A”, Exhibit “B”, and Exhibit “C”.<sup>2</sup> RWE respectfully requests rehearing and rescission of the Orders, which were enacted in violation of the Commission’s rules, the Public Utility Regulatory Act (“PURA”),<sup>3</sup> the Texas Administrative Procedure Act (“APA”), and the Governor’s Disaster Declaration.<sup>4</sup>

**I. INTRODUCTION**

In February 2021, the state of Texas experienced an unprecedented winter storm, which challenged each component of the electric industry. During the storm, the Electric Reliability

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<sup>1</sup> *Oversight of the Electric Reliability Council of Texas*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Mar. 1, 2021).

<sup>2</sup> Exhibit “C” includes the Commission’s memorandum dated February 17, 2021, moving the orders from Project No. 51617 to Project No. 51812.

<sup>3</sup> Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001–66.016 (West 2007 & Supp. 2014).

<sup>4</sup> Administrative Procedure Act, Tex. Gov’t Code Ann. §§ 2001.001-.902 (West 2008 & Supp. 2014).

Council of Texas (“ERCOT”), facing significant demand and challenges related to supply, required firm load shed to avoid a system-wide failure.<sup>5</sup> At the same time, the PUC issued the Orders during two emergency open meetings<sup>6</sup> directing ERCOT to ensure that firm load that was being shed was accounted for in ERCOT’s scarcity pricing signals, which artificially set ERCOT’s system-wide offer cap at \$9,000/MWh, the maximum amount permitted under 16 Tex. Admin. Code (“TAC”) 25.505(g)(6)(B).<sup>7</sup> The results of these events were catastrophic, both for the citizens of the State and for the participants in the electric industry. Texans faced days of blackouts in temperatures well below freezing, and certain participants in the industry experienced catastrophic financial losses, while others benefitted from significant windfalls. RWE in particular suffered significant losses as a direct result of the Commission’s Orders.

Through its actions, the Commission chose to unilaterally reset ERCOT competitive pricing at the maximum possible price, something they lack authority to do even in the event of an emergency. There is no statutory authority allowing the Commission to engage in such actions, particularly to establish rules that are contrary to the Commission’s own rules and the ERCOT protocols. Further, the Commission decided to alter energy prices, causing dramatic impacts to the entire electric industry, while failing to give any meaningful notice to the impacted market participants. Changes to Commission rules and ERCOT protocols require significant market input, as well as a timeframe before changes are made effective. Market participants such as RWE relied

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<sup>5</sup> ERCOT Market Notice, M-C021521-01 Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices. (Feb. 15, 2021); ERCOT Market Notice, M-C021521-02, Update: Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 16, 2021); ERCOT Market Notice, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021).

<sup>6</sup> See PUC Emergency Open Meeting, available at [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210215/](http://www.adminmonitor.com/tx/puct/open_meeting/20210215/) (Feb. 15, 2021); PUC Emergency Open Meeting, available at [http://www.adminmonitor.com/tx/puct/open\\_meeting/20210216/](http://www.adminmonitor.com/tx/puct/open_meeting/20210216/) (Feb. 16, 2021).

<sup>7</sup> See *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception (Feb. 15, 2021).

on the established Commission rules and ERCOT protocols in making decisions. In the Orders, the Commission took action quickly with effectively no notice, depriving market participants from due process notice and hearing before making changes to the market.

The PUC's actions in this circumstance effectively changed the rules during an emergency in violation of its own authority and without providing adequate notice to market participants. This type of procedural and substantive mistake must be corrected to restore the type of stability participants expect from the Texas electric market.

The Commission failed to follow procedural requirements and lacked authority under PURA or the PUC rules to unilaterally modify competitive pricing. The Commission failed to identify valid substantive authority for its Orders and failed to follow the rules associated with contested case hearings, rulemakings, emergency rulemakings, PURA, or actions under the Governor's Disaster Declaration. Accordingly, RWE respectfully asks the Commission to reevaluate and rescind the Orders in the public interest to mitigate the extraordinary harm that has resulted from the prolonged imposition of scarcity pricing during the storm and to respond to the imminent financial crisis that the ERCOT market is facing by removing the administrative price adders that ERCOT implemented between February 15-19, 2021. The Orders and the resulting implementation of artificial scarcity pricing caps did not and could not work to bring additional generation to the market at that time, and such actions must be corrected.

## **II. BACKGROUND**

Prior to the winter storm, Texas Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in the state, pursuant to Texas Gov't Code § 418.014.<sup>8</sup> Subsequently, on

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<sup>8</sup> Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

February 15, 2021, in response to ERCOT's declaration of its highest state of emergency, an Emergency Energy Alert Level 3 ("EEA3"), the PUC issued an order directing ERCOT to ensure that firm load being shed in EEA3 was being accounted for in ERCOT's scarcity pricing signals both prospectively and retroactively during the storm.<sup>9</sup> The Order also directed ERCOT to suspend the use of the low system-wide offer cap ("LCAP") until the Commission's next regularly scheduled open meeting and to use the high system-wide offer cap ("HCAP") of \$9,000/MWh as the system-wide offer cap until that time.<sup>10</sup> On February 16, 2021, the PUC issued a second order directing ERCOT to take these actions, but rescinding their directive to ERCOT related to correcting certain retroactive prices for load shed.<sup>11</sup> As a result of the Commission's Orders, ERCOT set Real Time energy prices at the HCAP for approximately four days.

As with many market participants, RWE suffered substantial financial losses as a result of the extraordinary February 2021 winter storm and the protracted administrative imposition of wholesale prices at the HCAP. RWE is a leading international provider of energy with a large Texas renewable commitment. RWE companies own and operate 21 renewable generation projects throughout Texas, a combination of wind and solar, and associated storage projects all within ERCOT with additional projects currently under construction within ERCOT. RWE has made a significant investment in Texas and is committed to a thriving Texas electric system. RWE has paid all invoices from the subject dates, and though it expects to dispute those invoices through the ERCOT alternative dispute resolution process, the timing of such processes far exceed the needs for immediate relief. As each day passes, the ability to upright the market becomes more

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<sup>9</sup> *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception (Feb. 15, 2021).

<sup>10</sup> *Id.*

<sup>11</sup> *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021).



and more difficult. As other market participants fail to pay or seek protection in bankruptcy court, the threat of additional losses to RWE and others looms large.

### **III. THE COMMISSION'S ORDERS FAILED TO FOLLOW APPROPRIATE PROCEDURE AS SET FORTH IN THE PURA, APA, OR THE GOVERNOR'S ORDERS**

In 1975, the Texas Legislature enacted PURA and created the PUC to provide statewide regulation of the rates and services of electric and telecommunication companies.<sup>12</sup> The PUC is responsible for administering PURA and adopting and enforcing rules pursuant to the authority granted in PURA. The PUC is also subject to the APA, as it is well established that the APA is generally applicable to “all state agencies” as the process for judicial review of their decisions.<sup>13</sup> In its Orders, the Commission did not clearly delineate the authority under which it was implementing its changes to energy prices.

Therefore, not only did the Commission act without authority by issuing the Orders, but even if they had authority, the issuance of the Orders was also procedurally invalid and the Orders should consequently be rescinded and vacated. RWE challenges the Orders on several grounds. First, the Orders were invalid under PURA § 39.001. Second, the Orders were a violation the APA, as they failed to follow all required procedures (for either contested cases, rulemakings, or emergency rulemakings). Last, the Orders failed to procedurally conform with the requirements of the Governor's Disaster Declaration.

#### **A. The Commission's Orders Fall Outside of the Scope of Authority Granted in PURA and are a Violation of PURA § 39.001.**

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<sup>12</sup> *State v. PUC*, 110 S.W.3d 580, 583 (Tex. App.—Austin 2003).

<sup>13</sup> *See Mosley v. Tex. HHS Comm'n*, 593 S.W.3d 250, 259 (Tex. 2019); *see also Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008) (finding that “[u]nless otherwise provided, the APA's contested-case and judicial-review procedures apply to agency-governed proceedings.”).

As a general rule, an administrative agency is a creation of the legislature, and thus, “only has the powers expressly conferred and those necessary to accomplish its duties.”<sup>14</sup> To determine whether the PUC acted appropriately within the scope of their authority under PURA, the Commission’s actions must be evaluated within their grant of authority.<sup>15</sup> Chapter 39 of PURA was enacted to “protect the public interest during the transition to and in the establishment of a fully competitive electric power industry.”<sup>16</sup> Accordingly, the statute expressly limits an agency’s ability to regulate pricing, first by codifying the legislative intent behind PURA, stating that “electric services and their prices should be determined by customer choices and the normal forces of competition.”<sup>17</sup> It also states that “regulatory authorities . . . may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title” and that they “shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition.”<sup>18</sup> However, when deciding to set the entire ERCOT wholesale power market at the maximum amount permissible of \$9,000/MWh, the Commission violated these explicit instructions to follow the “normal forces of competition” when establishing pricing. The Commission’s actions were also a violation of the directive not to make rules or issue orders regulating prices.

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<sup>14</sup> *State v. Public Util. Comm’n*, 883 S.W.2d 190, 194 (Tex. 1994).

<sup>15</sup> *Id.*; Tex. Gov’t Code § 2001.174.

<sup>16</sup> Tex. Util. Code § 39.001(a).

<sup>17</sup> Tex. Util. Code § 39.001(a).

<sup>18</sup> Tex. Util. Code § 39.001(c), (d).

The Commission cites to PURA § 39.151(d)<sup>19</sup> in its Orders stating that the PUC has “complete authority” over ERCOT. However, the full sentence granting the Commission with that authority reads: “The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization’s accountability and to ensure that the organization adequately performs the organization’s functions and duties.”<sup>20</sup> Therefore, the scope of the Commission’s authority is much more limited: to “oversee and investigate” ERCOT’s finances, budget and operations, not to carte blanche modify rules and ERCOT protocols or unilaterally change ERCOT’s prices. It is well established in Texas precedent that “the PUC is a creature of the legislature and has no inherent authority.”<sup>21</sup> Accordingly, the PUC’s delineation of authority from PURA does not encompass the ability to arbitrarily modify rules, ERCOT protocols, and change prices. It is improper for the PUC to confer onto itself greater authority than what was prescribed by the Texas Legislature and to act with authority it does not possess.<sup>22</sup>

To establish a rule’s facial invalidity, challengers are required to show that the rule: “(1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.”<sup>23</sup> As explained above, the Commission’s Orders directly violate the statutory requirements of PURA, are opposed to the statute’s general objectives, and imposed

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<sup>19</sup> The Orders also cite to 16 TAC § 25.501. However, while this rule allows the Commission to initiate certain pricing procedures, it does not provide an avenue for the Commission to unilaterally modify pricing without proper notice under PURA, the APA, or the Governor’s Disaster Declaration.

<sup>20</sup> Tex. Util. Code § 39.151(d).

<sup>21</sup> *PUC of Tex v. City Pub Serv Bd of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001) (citing *Public Util Comm’n v GTE-Southwest*, 901 S.W.2d 401, 406 (Tex. 1995)).

<sup>22</sup> *Public Util. Comm’n v. GTE-Southwest*, 901 S.W.2d 401, 406 (Tex. 1995).

<sup>23</sup> *TXU Generation Co., L P v PUC of Tex*, 165 S.W.3d 821, 827 (Tex. App.—Austin 2005).

significant conditions and burdens on the electric market during a time of crisis. As a result, the Orders are void in contravention of the requirements set forth in PURA.

***B. The Commission's Orders Do Not Comply with the Procedural Requirements of the Administrative Procedure Act and Therefore are Invalid.***

In issuing these Orders, the Commission failed to comply with the APA.<sup>24</sup> The APA's stated purpose is to "provide minimum standards of uniform practice and procedure for state agencies," including the PUC.<sup>25</sup> It governs two key types of agency actions: adjudication and rulemaking. Pursuant to Tex. Gov't Code § 2001.003(1), adjudication occurs when "legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." Rulemaking, on the other hand, is required for any "agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency."<sup>26</sup> The resulting question is how to classify the Commission's Orders, as they clearly involve both the legal rights of a party and are generally applicable statements that implement, interpret, and prescribe laws. As explained in further detail below, regardless of how the Commission chooses to categorize its Orders under the APA, the Commission's actions did not comply with the necessary procedures for a contested case, rulemaking, or emergency rulemaking as set forth in the APA, and therefore, the Orders are invalid and should be voided. There is no exception under the APA that would enable the Commission's actions here. As the Texas Supreme Court has stated, "[w]hatever an agency's authority . . . , it cannot extend to contravening the APA's express requirements. . . . It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements."<sup>27</sup>

***(1) Contested Case***

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<sup>24</sup> Tex. Gov't Code §§ 2001.001–.902.

<sup>25</sup> Tex. Gov't Code § 2001.001(1).

<sup>26</sup> Tex. Gov't Code § 2001.003(6).

<sup>27</sup> *Mosley v. Tex. HHS Comm'n*, 593 S.W.3d 250, 261 (Tex. 2019).

A contested case is defined under the APA as “a proceeding, including a ratemaking a licensing proceeding, which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”<sup>28</sup> If the Commission believes it was authorized to issue its Orders under the contested case procedure set forth in the APA, a motion for rehearing must be filed no later than the 25th day after the date the decision or order that is the subject of the motion is signed.<sup>29</sup>

In a contested case, each party is entitled to an opportunity “for hearing after reasonable notice of not less than 10 days” and “to respond and to present evidence and argument on each issue involved in the case.”<sup>30</sup> Here, the market participants impacted by the Commission’s orders were not given notice of the energy pricing changes and did not have the opportunity to respond or provide comments to the Commission before it was effective.

Not only were the requirements of notice and a hearing not satisfied with these Orders, but the Commission also failed to follow rules for final decisions and orders required by the APA. In particular, a decision or order is required to include “findings and fact and conclusions of law, separately stated.”<sup>31</sup> Additionally, the findings of fact “may only be based on the evidence and on matters that are officially noticed.”<sup>32</sup> In this circumstance, the Commission failed to comply with any of these requirements through its Orders. Therefore, the Commission’s Orders violate the statutory requirements as set forth in the APA and were issued as a result of prohibited procedure.

## **(2) Rulemaking**

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<sup>28</sup> Tex. Gov’t Code § 2001.003(1).

<sup>29</sup> Tex. Gov’t Code § 2001.146(a).

<sup>30</sup> Tex. Gov’t Code § 2001.051.

<sup>31</sup> Tex. Gov’t Code § 2001.141(b).

<sup>32</sup> Tex. Gov’t Code § 2001.141(c).

As previously stated, in its Orders, the Commission did not clearly delineate the authority under which it was acting. However, it is well-established in Texas precedent that when agency actions do not fit squarely into the groupings of “contested cases” or “rulemakings,” the courts look to the effect of the agency actions and the definitions provided within the APA to determine how to best categorize them for purposes of appeals and reconsideration.<sup>33</sup> The APA states that the term “rule” refers to:

- (A) a state agency statement of general applicability that:
  - (i) implements, interprets, or prescribes law or policy; or
  - (ii) describes the procedure or practice requirements of a state agency
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding internal management or organization of a state agency and not affecting private rights or procedures.<sup>34</sup>

There is no question that the Commission’s Orders are statements of “general applicability” because they broadly effected all participants in the ERCOT market. Further, the Orders expressly interpreted existing law and prescribed new policy regarding those laws: “The Commission believes this outcome [referencing the energy price fluctuations] is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.”<sup>35</sup> The Commission evaluated existing laws, chose to interpret the correct way they should be applied, and effectively set a mandatory price at the HCAP for four days. Through its Orders, the Commission essentially engaged in unlawful *ad hoc* rulemaking, which has been defined by Texas Courts as any “agency statement that interprets,

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<sup>33</sup> See e.g., *Teladoc, Inc v Tex Med. Bd*, 453 S.W.3d 606, 621 (Tex. App.—Austin 2014) (finding that an agency action through an “informal” written agency pronouncement regarding law or policy was a “rule” under the APA); *El Paso Hosp. Dist v. Tex HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008) (finding that an agency statement was a rule because it was an interpretation of its formally promulgated rules that was not found in the text of the existing rules).

<sup>34</sup> Tex. Gov’t Code § 2001.003(6).

<sup>35</sup> *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception at 1 (Feb. 15, 2021).

implements, or prescribes agency law or policy.”<sup>36</sup> The Orders obviously prescribe agency policy regarding pricing, and the APA bars any rule modifications or reinterpretation without following the procedures of the formal rulemaking process.

Agency actions that fall into the definition of a “rule” are treated as a rulemaking. In circumstances where an agency action was determined to be a rulemaking, the courts then analyzed whether the APA’s procedures for a rulemaking were properly followed.<sup>37</sup> Specifically, the APA requires when the Commission initiates a rulemaking on its own motion, it must give notice of the proposed rule at least 30 days before the rule is adopted and the proposed rule must be published in the *Texas Register*.<sup>38</sup> Further, before adopting a rule, the Commission must “give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing” and must grant an opportunity for a public hearing if requested by at least 25 persons, a governmental subdivision or agency, or an association with at least 25 members.<sup>39</sup> These rulemaking procedures are designed to maximize “public participation in the rulemaking process,” set forth as the stated purpose for the APA.<sup>40</sup>

Here, the Commission’s Orders did not follow any of these notice and hearing requirements, derailing the APA’s intent to allow public participation in rulemakings. In circumstances where rules are improperly adopted, the courts have found the corresponding rules

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<sup>36</sup> *CenterPoint Energy Entex v R.R. Comm’n*, 213 S.W.3d 364, 369 (Tex. App.—Austin 2006).

<sup>37</sup> See e.g., *Teladoc, Inc v Tex. Med Bd*, 453 S.W.3d 606 (Tex. App.—Austin 2014); *El Paso Hosp Dist. v Tex HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008); *Tex. State Bd. of Pharm v Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014); *Combs v Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009).

<sup>38</sup> Tex. Gov’t Code § 2001.023.

<sup>39</sup> Tex. Gov’t Code § 2000.029.

<sup>40</sup> Tex. Gov’t Code §§ 2001.021–.041.

void and remanded the issues back to the agency.<sup>41</sup> Accordingly, the Orders should be voided and the underlying questions remanded to the PUC for further consideration.

**(3) *Emergency Rulemaking***

In certain limited circumstances, the APA provides that an agency may enact emergency rulemaking. If the Commission categorizes its Orders as an emergency rulemaking, the Commission failed to comply with required procedures.<sup>42</sup>

Given the possible implications of a rulemaking that is not vetted through the typical notice and hearing process, the APA sets forth specific requirements for emergency rulemakings. In particular, the APA permits a state agency to adopt an emergency rule without prior notice or hearing if the agency:

“ (1) finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days’ notice; and

(2) states in writing the reasons for its finding under Subdivision (1).”<sup>43</sup>

The APA also requires that the agency set forth this finding in the emergency rule’s preamble and filed with the secretary of state for publication in the *Texas Register*.<sup>44</sup> Here, the Commission did not comply with any of these requirements, as they did not make the finding that the Orders were required due to “imminent peril to the public health, safety, or welfare,” nor did they publish the Orders in the *Texas Register*.

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<sup>41</sup> See e.g., *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606 (Tex. App.—Austin 2014); *El Paso Hosp. Dist. v. Tex. HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008); *Tex. State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014); *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009).

<sup>42</sup> Tex. Gov’t Code § 2001.035(b).

<sup>43</sup> Tex. Gov’t Code § 2001.034(a).

<sup>44</sup> Tex. Gov’t Code § 2001.034(b), (d).



Section 2001.035(a) of the APA states that a “rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034.” The phrase substantial compliance is further explained to mean that “the agency’s reasoned justification demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective.”<sup>45</sup> The changes to ERCOT pricing and protocols mandated by the Commission’s Orders do not meet the substantial compliance standard and should be voided on those grounds. Additionally, because the Commission failed to follow the procedural requirements for emergency rulemaking, the Orders are also void on that basis.

C. **The Commission’s Orders Did Not Comply with the Procedural Requirements of the Governor’s Disaster Declaration and Acted Outside its Scope.**

In its Orders, the Commission also references Texas Governor Greg Abbott’s Disaster Declaration, but that declaration did not provide a valid basis for issuing the Orders. As previously discussed, in light of the winter storm and expected sub-freezing temperatures, Texas Governor Greg Abbott issued a disaster declaration of all counties in the state of Texas.<sup>46</sup> Under Tex. Gov’t Code § 418.014, the Governor is permitted to issue a state of disaster if “the occurrence or threat of disaster is imminent.” In his Order, the Governor stated, in pertinent part:

“[A]ny regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor.”

First, the Commission merely referenced the Governor’s Disaster Declaration and did not state that it was a basis for their actions. Regardless, even if the Commission believed its actions were authorized under the Governor’s Disaster Declaration, the Commission failed to obtain written

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<sup>45</sup> Tex. Gov’t Code § 2001.035(c).

<sup>46</sup> Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

approval from the Governor's office before implementing the Orders. As a result, market participants were given little to no notice of the energy pricing changes. The Governor's Disaster Declaration requires written approval before deviating from ERCOT protocols or any of the rules of a state agency and the Commission's failure to obtain this approval required voiding the improperly adopted Orders.

Additionally, the Governor's Disaster Declaration allows for the "suspension" of certain rules that may hinder necessary action—it does not allow the Commission to modify the rules to set mandatory price adders for a four day period, as the Orders did here. Accordingly, the Commission acted far outside any potential authority in altering energy prices in a time where the emergency situation only allowed them to suspend certain rules.

#### IV. CONCLUSION

For the reasons set forth above, RWE respectfully requests that the Commission grant this motion for rehearing, rescind and vacate the Orders, and reverse the artificial administrative price adder that was imposed from February 15-19, 2021. RWE further requests all other relief to which it may be entitled.

Respectfully submitted,

/s/ Alison Gardner

Alison Gardner

Bar No. 24013029

Sr. Vice President & General Counsel

RWE Renewables Americas, LLC

701 Brazos, Suite 1400

Austin, Texas 78701

Tel: (512) 482-4009

alison.gardner@rwe.com

**COUNSEL FOR RWE RENEWABLES  
AMERICAS, LLC**

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record on this date via the Commission's Interchange in accordance with the Commission's Order in Docket No. 50664 suspending PUC Procedural Rule 22.74.

/s/ Alison Gardner

Alison Gardner

## **EXHIBIT A**

(PUC Order dated February 15, 2021)

PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC  
RELIABILITY COUNCIL OF TEXAS

§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS



**ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

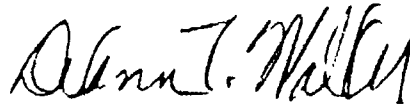
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15 day of February 2020.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER

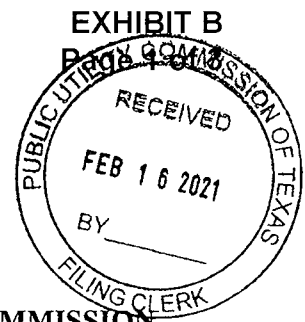


SHELLY BOTKIN, COMMISSIONER

**EXHIBIT B**

(PUC Order dated February 16, 2021)





PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC  
RELIABILITY COUNCIL OF TEXAS

§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

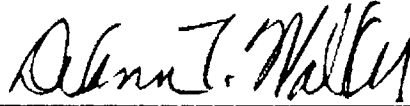
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS




DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER

Commissioner Botkin abstains for the portion of this order that rescinds the Commission's directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 and the portion that directs ERCOT to not correct any such past practices. In all other aspects, Commissioner Botkin joins in this Order.



SHELLY BOTKIN, COMMISSIONER

## **EXHIBIT C**

(PUC Memorandum in Project No. 51812 dated February 17, 2021)

DeAnn T. Walker  
Chairman  
Arthur C. D'Andrea  
Commissioner  
Shelly Botkin  
Commissioner  
John Paul Urban  
Executive Director



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PUBLIC UTILITY COMMISSION  
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Greg Abbott  
Governor

## *Public Utility Commission of Texas*

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**TO:** Central Records

**FROM:** Stephen Journeay  
Commission Counsel

**DATE:** February 17, 2021

**RE:** Project 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Commission orders directing action by ERCOT

---

Please file a copy of the following orders issued by the Commission attached to this memorandum in the above referenced project.

Order of February 15, 2021 directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

Order of February 16, 2021 second directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

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PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC	§	PUBLIC UTILITY COMMISSION
RELIABILITY COUNCIL OF TEXAS	§	
	§	OF TEXAS

**ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

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This Order addresses two significant market anomalies identified during this EEA3 event.

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ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

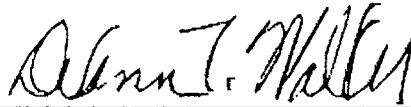
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15th day of February 2021.

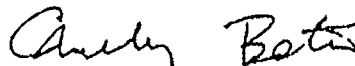
PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER



**PUC PROJECT NO. 51617**

<b>OVERSIGHT OF THE ELECTRIC</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>RELIABILITY COUNCIL OF TEXAS</b>	<b>§</b>	
	<b>§</b>	<b>OF TEXAS</b>

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION  
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

**I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event**

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

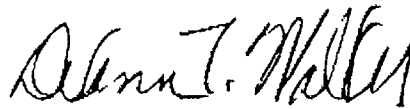
## **II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices**

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

## Exhibit F

PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS	§ § § § §	BEFORE THE  PUBLIC UTILITY COMMISSION  OF TEXAS
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PUC DOCKET NO. 51812

ISSUES RELATED TO THE STATE OF DISASTER FOR THE FEBRUARY 2021 WINTER WEATHER EVENT	§ § § § §	BEFORE THE  PUBLIC UTILITY COMMISSION  OF TEXAS
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**MOTION TO RECONSIDER**

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## **MOTION TO RECONSIDER**

NOW COME Bobcat Bluff Wind, LLC; TX Hereford Wind, LLC; Las Majadas Wind, LLC; Coyote Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy LLC; Ector County Energy Center LLC; and Pattern Energy Group LP, including its affiliate project companies, Pattern Gulf Wind LLC; Logan's Gap Wind LLC; Pattern Panhandle Wind, LLC; and Pattern Panhandle Wind 2 LLC (collectively, the "Movants"), and file this Motion to Reconsider the Commission's February 15 and 16, 2021, orders in Project No. 51617. Under the Texas Administrative Procedure Act ("APA") § 2001.146, this motion is timely filed.

In support thereof, the Movants states as follows:

### **I. SUMMARY OF MOTION**

The Public Utility Commission of Texas ("PUC" or "Commission") issued unusual orders on February 15 and 16, 2021, abandoning electricity market pricing and artificially raising wholesale prices—which are under normal conditions on average \$22/megawatt hour ("MWh")—to a \$9,000/MWh cap for almost a week. These unprecedented orders had a devastating financial impact on many Electric Reliability Council of Texas ("ERCOT") market participants, including the Movants. The ongoing, widespread public outcry in response to the orders—in these dockets and projects, at the legislature, and in the media—reflects the extent of the adverse impacts.

The Movants therefore respectfully request that the PUC reconsider these orders and correct the artificial pricing for the entire time period in which they were issued. The Commission lacked authority under PURA or under the Governor's disaster proclamation to make these decisions in this manner, and the orders failed to follow any of the procedures required by Texas law, so they must be rescinded. In addition and/or alternative to the above request, ERCOT extended the \$9,000/MWh pricing for approximately 32 hours after it should have been terminated

under the Commission's orders. The Movants request that, at the very least, ERCOT's error be corrected after load shed ended, consistent with the calls of state elected officials, the Commission's own Independent Market Monitor ("IMM"), and dozens if not hundreds of market participants.

## **II. FACTUAL BACKGROUND**

### **A. About the Movants**

Bobcat Bluff Wind, LLC; TX Hereford Wind, LLC; Las Majadas Wind, LLC; Coyote Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy LLC; Ector County Energy Center LLC; and Pattern Energy Group LP, including its affiliate project companies, Pattern Gulf Wind LLC, Logan's Gap Wind LLC, Pattern Panhandle Wind, LLC, and Pattern Panhandle Wind 2 LLC, are the developers, owners, and/or operators of a diverse mix of energy resources in ERCOT, including natural gas, solar, and wind generation resources. They are active participants in the ERCOT market.<sup>1</sup> Each Movant has experienced significant adverse financial impacts as a result of the Commission's orders due to the inflated costs the Movants had to bear in order to comply with bilateral obligations directly tied to the market clearing price of energy in the ERCOT market. But for ERCOT's implementation of the Commission's orders, the magnitude of the adverse financial impacts of the Winter Weather Event on Movants would have been significantly less than what occurred as a result of the Commission's orders.

### **B. February 2021 Weather Event, Load Shed, and Commission Orders**

In February, Texas experienced record-setting severe winter weather across the entire state. Governor Abbott declared a state disaster for all Texas counties on February 12, 2021.<sup>2</sup>

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<sup>1</sup> While contested case formalities have not been followed in this proceeding, the Movants are "parties" to here with standing to participate in that they have justiciable interests which have been adversely affected by this proceeding, as contemplated by Subchapter F of the Commission's procedural rules.

<sup>2</sup> See Exhibit A at 1.



Unprecedented winter power usage occurred simultaneous with weather-related natural gas and power delivery failures; natural gas prices soared, causing the cost to produce electricity increased dramatically. At the same time, transportation and communication challenges compounded the power and gas delivery problems and impeded solutions. The result was that energy demand in the ERCOT exceeded available supply beginning overnight February 14 – 15, 2021. ERCOT declared its highest state of emergency, Emergency Energy Alert Level 3 (“EEA3”) and ordered curtailment over 10,000 MW of firm load.<sup>3</sup>

In response to the ERCOT load shed and the market pricing resulting from the application of ERCOT’s protocols, the Public Utility Commission issued orders administratively adjusting pricing in the ERCOT market.

First, at an emergency meeting on February 15, 2021, the Commission issued an order, attached hereto as **Exhibit A** and styled *Order Directing ERCOT to Take Action and Granting Exception to Commission Rules*, observing that “[e]nergy prices should reflect the scarcity of the supply.” While all three Commissioners expressed some trepidation with respect to taking such broad action,<sup>4</sup> the Commissioners nonetheless ordered the following:

1. “[T]he Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.”

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<sup>3</sup> *See id.*

<sup>4</sup> Open Meeting Tr, at 3:11-12 (Feb. 15, 2021) (Comm’r D’Andrea: “I didn’t like the idea of just sort of blindly moving money from one pocket to another”), 3:22 (Comm’r Botkin: “[T]hese changes are – they are a big deal”), and 4:12-13 (Chairman Walker: “I think this is something we’ve kind of wrestled with in the past . . . this will send some incorrect signals too”).

2. “ERCOT shall suspend any use of the [low system-wide offer cap] LCAP until after the Commission’s regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP [\$9,000/MWh] as the system-wide offer cap until that time.”<sup>5</sup>

The next day, the Commission reconvened in a second emergency meeting and issued a new order, styled the *Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules*. This second order rescinded the February 15 order to the extent it was retroactive. In changing course so quickly, Chairman Walker acknowledged that part of the previous day’s order was issued “in haste and – and probably incorrectly.”<sup>6</sup> Commissioner Botkin admitted they made a “hard decision” the previous day and abstained from the second order.<sup>7</sup> Ultimately, the February 16 order, attached hereto as **Exhibit B**, retained the directives to ERCOT (1) to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals and (2) to use the HCAP for so long as load was being shed, but the order required that the Commission’s “directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 ... is hereby rescinded.” The second order directed “ERCOT to not correct any such past practices,” meaning that the directive “to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals” began at the effective date and time of the prior order, February 15 at 10:15 p.m.<sup>8</sup> ERCOT implemented the Commission’s order through an adjustment to the Real-Time Reliability Deployment Price Adder.<sup>9</sup>

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<sup>5</sup> Exhibit A at 2.

<sup>6</sup> Open Meeting Tr. at 2:16 (Feb. 16, 2021).

<sup>7</sup> Open Meeting Tr. at 5:19-20 (Feb. 16, 2021).

<sup>8</sup> Exhibit B at 2; ERCOT Notice M-C021521-02 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at [http://www.ercot.com/services/comm/mkt\\_notices/archives/5221](http://www.ercot.com/services/comm/mkt_notices/archives/5221).

<sup>9</sup> ERCOT Notice M-C021521-01, *Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at [http://www.ercot.com/services/comm/mkt\\_notices/archives/5196](http://www.ercot.com/services/comm/mkt_notices/archives/5196), and ERCOT Notice M-C021521-02, *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at [http://www.ercot.com/services/comm/mkt\\_notices/archives/5221](http://www.ercot.com/services/comm/mkt_notices/archives/5221).

Days later, on February 17, at 9:24 p.m., ERCOT provided an update regarding its implementation of the Commission's order and adjustment to the price adder and stated, "Once ERCOT is no longer instructing firm Load shed, the adjustment will be set to 0".<sup>10</sup> Later that evening, at 11:55 p.m., ERCOT rescinded all load shed instructions. However, it was not until almost 8 hours later, at 7:46 a.m. on February 18, that ERCOT provided notice that it had deviated from the Commission's orders and its prior representations. At that time, ERCOT stated, "While ERCOT has authorized all Transmission and Distribution Service Providers to restore all Load associated with the EEA that was declared on Monday, February 15, 2021, many customers have not yet been re-energized. As a result, ERCOT will remain in EEA3 through at least the morning peak period on Friday, February 19, 2021."<sup>11</sup> ERCOT further changed the duration of the Commission-ordered administrative pricing to extend until ERCOT exited EEA3.<sup>12</sup> The Commission did not issue an order to authorize this change in ERCOT's implementation processes. While there were increasing reserve levels reported throughout the day on February 18, underscoring the lack of load shed from the morning of February 17 forward,<sup>13</sup> ERCOT remained in EEA3 and continued imposing administrative price adders to set the real-time settlement point price at the administratively set HCAP of \$9,000/MWh until after 9:00 a.m. on February 19, 2021.

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<sup>10</sup> ERCOT Notice M-C021521-03 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at [http://www.ercot.com/services/comm/mkt\\_notices/archives/5224](http://www.ercot.com/services/comm/mkt_notices/archives/5224).

<sup>11</sup> ERCOT Notice M-C021521-04 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at [http://www.ercot.com/services/comm/mkt\\_notices/archives/5225](http://www.ercot.com/services/comm/mkt_notices/archives/5225).

<sup>12</sup> *Id*

<sup>13</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Texas Energy Association of Marketers ("TEAM") Emergency Request to Enforce Commission Order at 4 (Feb. 19, 2021) (noting that by 12:30 p.m. on February 18th, ERCOT was carrying over 10,500 MWs of reserves; by 4:45 p.m., ERCOT was carrying over 16,000 MWs of reserves—yet ERCOT did not remove the administrative price adders until February 19th at 9:00 a.m.).

### C. Market and Public Outcry

Since those Commission orders and that ERCOT activity, a plethora of market participants have implored the Commission to take emergency action to correct some or all of its artificial pricing actions and “to remove the administrative price adders that set prices to \$9,000/MWh.”<sup>14</sup> At least one market participant has noticed an immediate appeal of the Commission’s orders to the Third Court of Appeals.<sup>15</sup> Another filed a complaint against ERCOT with the Commission.<sup>16</sup>

Market participants are not the only entities who have expressed alarm at the Commission’s market interference. Potomac Economics, which serves as the Independent Market Monitor (IMM), has recommended specifically that the Commission “remove the inappropriate pricing intervention” on February 18 – 19, 2021 (the time period after ERCOT ended the load shed but before it removed the administrative price adder), among other recommendations.<sup>17</sup>

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<sup>14</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, EDF Renewable Energy Request for Emergency Action at 1 (Mar. 1, 2021); *see also, e.g.*, requests for emergency action, letters, and/or comments by TEAM (Feb. 19, 2021); BPR OP, LP, City of Baytown, City of Rosenberg, Creative Specialty Foods Inc., Crownmark Imports, United Minerals and Properties, Inc. dba Cimbar Performance Minerals Inc., City of Round Rock, Chisos Logistics, Kyocera Document Solutions America, Inc., Arandas Bakery, Harbor Freight Tools USA, Inc., Lincoln Rackhouse, Best Press Inc., Leslie Poolmart, Inc., NET Power, LLC, Stratas Foods LLC, Alamo Crossing, LLC, B&B Theatres Operating Co., Inc., IKO Southwest Inc., KRM 505 Sam Houston LLC, KRM 525 Sam Houston LLC, McCoy Corporation, NW Crossings Management LLC, Overwraps Packaging, Inc., Rojan, Inc., SanMar Corporation, Suffolk Business Solutions, VRE Properties LLC, Webster Surgical Specialty Hospital, LTD, Bixby Enterprises, Explorer Pipeline Company, G&H Diversified Manufacturing, RS 4606 FM 1960 LLC, Blue Line Distribution, Redoak Drive LLC, Cryoport Systems, Data Foundry, Huhtamaki, Inc. (Feb. 22, 2021); Pattern Energy Group (Feb. 25, 2021); Bell Textron, Inc. (Mar. 1, 2021); GridPlus Texas Inc., LPT LLC (aka Liberty Power), Summer Energy LLC, ATG Clean Energy Holdings Inc., Volt Electricity Provider LP, Brooklet Energy Distribution LLC, Pogo Energy LLC, Alliance Power Company LLC, 3000 Energy Corp. (aka Penstar Power), Bulb US LLC 174, Power Global Retail Texas LLC (aka Chariot Energy) (Mar. 2, 2021); GridPlus Texas Inc. (GridPlus) LPT LLC (Liberty Power) Summer Energy LLC ATG Clean Energy Holdings Inc. Volt Electricity Provider LP Brooklet Energy Distribution LLC Pogo Energy LLC Alliance Power Company LLC 3000 Energy Corp. (Penstar Power) Bulb US LLC 174 Power Global Retail Texas LLC (Chariot Energy) (Mar. 2); Enbridge Inc. (Mar. 8, 2021); and at least 18 electric cooperatives as of the time of this motion.

<sup>15</sup> *Luminant Energy Co. LLC v. Pub. Util. Comm’n of Tex.*, Cause No. 03-21-00098-CV (Tex. App.—Austin, notice of appeal filed Mar. 2, 2021).

<sup>16</sup> *Complaint of DGSP2, LLC Against the Electric Reliability Council of Texas, Inc.*, Docket No. 51874 (Mar. 5, 2021).

<sup>17</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Second Letter from Potomac Economics (Mar. 4, 2021). The IMM continued to support this position in its subsequent filing on March 11, 2021. *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Third Letter from Potomac Economics (Mar. 11, 2021).

Texas Senators, Representatives, the Lieutenant Governor, and other elected officials have expressed their grave concerns to the Commission in writing, with some noting “a staggering number of market participants” affected by the repricing and citing the bankruptcy of the state’s oldest electric cooperative.<sup>18</sup> The governor appears to share their concerns; on March 9, 2021, Governor Abbott declared the following a legislative priority:

**Legislation relating to the correction of any billing errors by the Electric Reliability Council of Texas (ERCOT), including any inaccurate excessive charges and any issues regarding ancillary service prices.**

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#### **D. Commission Response to Complaints**

The Commission acknowledged some of the widespread industry concerns at its March 5, 2021 open meeting.<sup>20</sup> The Commission directed its Staff to open a rulemaking and issue a request

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<sup>18</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Letters from Senator Drew Springer (Mar. 5, 2021) (“Numerous parties have petition the PUCT to find another solution other than letting prices automatically be set at \$9000 for the whole week or for parts of the week, including TEAMS and the Independent Market Monitor (IMM). According to the IMM, **because ERCOT held prices at the value of lost load (VOLL) by inflating the Real-Time On-Line Reliability Deployment Price Adder, \$16 billion in additional costs were added to the market.**”) (emphasis in original); Senator Beverly Powell (Mar. 5, 2021); Representative Drew Darby and Representative Tom Craddick (Mar. 9, 2021) (quoted, referencing the bankruptcy of Brazos Electric Cooperative, Inc., which was filed in the Northern District of Texas on Mar. 1, 2021); Lieutenant Governor Dan Patrick (Mar. 10, 2021) (“Correcting this \$16 billion error will require an adjustment, but it is the right thing to do.”). On March 11, 2021, the IMM refined her original estimate by netting transactions at the corporate level, which resulted in a revised estimate that the IMM’s “recommendations would alter the ERCOT settlements by a total of \$5.1 billion. *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Third Letter from Potomac Economics (Mar. 11, 2021).

<sup>19</sup> Legislative Message from Greg Abbott, Governor of Tex., Office of the Governor, to the Senate and House of Representatives of the 87th Tex. Legislature, Regular Session, (Mar. 9, 2021) (available at [https://gov.texas.gov/uploads/files/press/EMERG\\_MESSAGE\\_legislative\\_matter\\_repricing\\_electricity\\_FINAL\\_03-09-21.pdf](https://gov.texas.gov/uploads/files/press/EMERG_MESSAGE_legislative_matter_repricing_electricity_FINAL_03-09-21.pdf)).

<sup>20</sup> Open Meeting Tr. at 18:18-30:17 and 40:2-3 (Mar. 5, 2021) (Chairman D’Andrea noted, “[W]e’ve got a bunch of repricing requests from the IMM. ... [T]he IMM raised some good points, and I think they’re very interesting. And so we definitely should consider them.” But he ultimately decided, “I’m not inclined to do it [reprice] today ... it’s just nearly impossible to unscramble this sort of egg...”; Comm’r Botkin agreed, saying “the energy market is the one that has the deadline today, and I say we don’t act.”).

for comments addressing potential adjustments to Commission rules regarding adjustments of the LCAP.<sup>21</sup>

However, the Commission did *not* grant the IMM's recommendation on March 5, and it has taken no further action to withdraw, clarify, or enforce its February 15 and 16 orders and correct the artificial market prices created by those orders.

### III. ARGUMENT

#### A. Introduction

The Movants appreciate that the Commission has initiated a rulemaking in Project No. 51871 and they intend to participate therein. Unfortunately, any action taken in that rulemaking can apply only prospectively. Thus, an amended rule could only correct pricing concerns for future events. Any action taken in that rulemaking proceeding will leave the significant February pricing issues uncured — at substantial harm to market participants like the Movants that acted in good faith during the unprecedented winter storm.

Therefore, the Movants respectfully request reconsideration and ask that the Commission rescind its February 15 and February 16, 2021, orders and reverse the artificial administrative price adder that was imposed from February 15 - 19, 2021.

To the extent the Commission declines to reconsider its orders in their totality, then in the alternative, the Movants request that the Commission clarify/enforce those orders and require ERCOT to remove the administrative price adder from 12:00 a.m. on February 18, 2021 to 9 a.m. on February 19, 2021. At the very least, and consistent with the Commission's orders, no

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<sup>21</sup> *Review of the ERCOT Scarcity Pricing Mechanism*, Project No. 51871, Request for Comments on the Low System-Wide Offer Cap (Mar. 8, 2021), asking for up to 10 pages of comment by March 19, 2021 and five pages of reply comments by March 26, 2021 on the following questions:

1. Should the Commission amend its rules to adjust the LCAP?
2. If the Commission amends its rules to adjust the LCAP, what specific adjustments should it make?
3. If the Commission amends its rules to adjust the LCAP, when should these adjustments take effect?

administrative price adders should have been imposed after load shed instructions were lifted. This is consistent with the recommendation of the IMM, requests by state leaders, and requests of dozens of market participants.<sup>22</sup> “[E]very minute of out-of-market pricing that was imposed in contravention of the Commission’s Order, when no load shed was ordered, costs the market and costumers millions of dollars and does irreversible harm.”<sup>23</sup>

**B. The Commission Should Grant the Motion to Reconsider and Rescind Its Orders Entirely**

***1. The Commission Did Not Have the Authority to Issue the February 15 and 16 Orders***

On February 16, when deciding to rescind part of the February 15 order, now-Chairman D’Andrea said, “I’ve said before, I really don’t like repricing at all, and I think we should generally move away from it unless we can – we hear that it’s really justified in a lot of situations. I think it’s very disruptive. . . .”<sup>24</sup> Although on that date the Commission agreed to keep its prospective administrative price adder in place, Chairman D’Andrea again reflected upon the complexity of this market interference on March 5, when he stated, “it’s just nearly impossible to unscramble this sort of egg, and the results of going down this path are unknowable.”<sup>25</sup>

The Movants appreciate that the Commissioners felt the great weight of their decisions.<sup>26</sup> The Movants also understand the urgency and pressure to act in real time to try to help bring more generation online during the storm. However, artificially adjusting the pricing in ERCOT was not a narrowly tailored means, or an effective one, to achieve that end; this drastic measure unfairly created winners and losers in the market. The Commission lacks the authority to unilaterally reset

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<sup>22</sup> See *supra* n.14 and 18.

<sup>23</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, TEAM Emergency Request to Enforce Commission Order at 1 (Feb. 19, 2021).

<sup>24</sup> Open Meeting Tr. at 4:1-4 (Feb. 16, 2021).

<sup>25</sup> Open Meeting Tr. at 30:15-17 (Mar. 5, 2021).

<sup>26</sup> Open Meeting at 3:22 and 4:1-2 (Feb. 15, 2021) (Comm’r Botkin: “[T]hese changes are – they are a big deal”; Chairman Walker: “Yeah. I mean, these are – are a big deal. . .”).

pricing in this manner, even during times of disaster. The Commission does not have the authority to pass *ad hoc* rules, make decisions that violate ERCOT protocols and its own rules, and change billions of dollars in pricing, without even granting market participants the meaningful notice or due process that correct procedures might have offered. While some market participants have indicated in filings with the Commission that they took action based on the Commission's orders and ERCOT's reinterpretation of the Commission's orders, others, like the Movants, were not able to change their position in the market in the face of quick administrative changes to Commission rules and ERCOT protocols that had been promulgated after long deliberation and with extensive market participant input.

**i. PURA Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner**

In the February 15 and 16 orders, the Commission cited PURA § 39.151(d) and 16 TAC § 5.501(a) as grounds for its authority to adjust ERCOT pricing. It is axiomatic that the Commission's authority is granted by the legislature, and consequently the legislature determines the boundaries of this authority as well.<sup>27</sup>

The orders cite PURA § 39.151(d) as granting the Commission "complete authority" over ERCOT, but in truth the legislature qualified that phrase in the statute:

The commission has complete authority to **oversee and investigate** the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties. (emphasis added).

When read in context, the scope of authority provided by this statute is more prescribed and constrained than the Commission's orders imply. The Commission has complete authority to "oversee" ERCOT, not to run ERCOT. This statute does not give the Commission the ability to

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<sup>27</sup> See *Pub. Util. Comm'n of Tex. v. Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315–16 (Tex. 2001); *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406–07 (Tex. 1995).



step in ERCOT's shoes, grant exceptions to rules, modify protocols, and artificially change prices, as was done on February 15 and 16, 2021.

ERCOT protocols are developed and approved with long deliberation and input by market participants. Those protocols work alongside the Commission's own market rules, which are also promulgated with careful deliberation and extensive stakeholder participation, consistent with the APA's notice and other requirements for rulemakings. It is critical that the Commission adopts, maintains, and stands by ERCOT's protocols and the Commission's rules. It is crucial that the Commission issues orders consistent with ERCOT's protocols and the Commission's rules. That regulatory certainty is vital to the market.

The Commission's decisions on February 15 and 16 are examples of regulatory *uncertainty*. Although repricing may be considered a market disruption, the Commission did not have the authority to grant exceptions to its rules and the ERCOT protocols and unilaterally impose drastic market changes under these circumstances—changes that had ten- to eleven-figure consequences to the state. *Ad hoc* repricing makes it difficult for market participants to model or prepare for future events.

The Commission also cited 16 TAC § 25.501 in its order. This rule may permit the Commission to direct market clearing prices of energy and other ancillary services in the ERCOT market, but the Commission cannot confer itself additional and greater authority through rules than has been granted by the legislature; the Commission cannot act with authority it does not possess.<sup>28</sup> 16 TAC § 25.501 enables, for example, the Commission to set the HCAP and the LCAP, but this rule does not allow the Commission to unilaterally alter pricing at a moment's notice and without providing notice due under law, even during a disaster.

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<sup>28</sup> See *id.*

**ii. The Governor's Disaster Proclamation Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner**

As referenced above, on February 12, 2021, Governor Abbott issued a Proclamation, which states in pertinent part:

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

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While this proclamation broadly suspends “any regulatory statute . . . or any order or rule of a state agency,” the proclamation is not applicable to the Commission’s February 15 and 16 orders for the two reasons set forth below.

First, while the February 15 and 16 orders do not on their face expressly suspend or amend ERCOT protocols, there can be no question that myriad ERCOT protocols were affected by the orders. ERCOT is non-profit organization and an “independent organization” certified by the Commission under PURA, not a state agency.<sup>30</sup> Therefore, its protocols are not regulatory statutes or orders or rules of a state agency. To the extent ERCOT protocols were implicated by the February 15 and 16 orders, the orders were not within the scope of the Governor’s disaster proclamation.

Second, even setting aside the issue of ERCOT protocols not being subject to suspension under the disaster proclamation, the proclamation requires that the Governor provide written approval of the suspension of such statutes, orders, or rules. The Commission’s orders expressly

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<sup>29</sup> *Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas*, OFF. OF THE TEX. GOVERNOR (Feb. 12, 2021), <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas>.

<sup>30</sup> APA § 2001.002(7).

grant waivers of the Commission's own rules on the basis of the disaster proclamation, but the orders do not reflect that the Governor provided any such written approval.

Consequently, as a result of these issues, the Governor's Disaster Proclamation does not confer the authority the Commission needed to issue the February 15 and 16 orders.

## ***2. Even if the Commission Had Authority, the February 15 and 16 Orders Were Procedurally Flawed***

Even assuming *arguendo* that the Commission had the legal authority to act on February 15 and 16, the orders do not follow the statutory procedures for state agency action.

The purpose of the APA is to "provide minimum standards of uniform practice and procedure for state agencies."<sup>31</sup> To that end, the APA provides two means for state agencies to act: either (1) through "contested cases," which are proceedings "in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing"<sup>32</sup>; or (2) by rule, which is "a state agency statement of general applicability that ... implements, interprets, or prescribes law or policy" or "describes the procedure or practice requirements of a state agency" including "the amendment or repeal of a prior rule."<sup>33</sup> Whichever set of procedures one might apply to the February 15 and 16 orders, they fall short.

### **i. The February 15 and 16 Did Orders Not Comply with Contested Case Procedures**

The APA sets forth very specific requirements under which contested cases must proceed. Among those requirements are notice and the opportunity to be heard:

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<sup>31</sup> APA § 2001.001(1).

<sup>32</sup> APA § 2001.003(1).

<sup>33</sup> APA § 2001.003(6).

SUBCHAPTER C. CONTESTED CASES: GENERAL RIGHTS AND PROCEDURES

Sec. 2001.051. OPPORTUNITY FOR HEARING AND PARTICIPATION; NOTICE OF HEARING. In a contested case, each party is entitled to an opportunity:

- (1) for hearing after reasonable notice of not less than 10 days; and
- (2) to respond and to present evidence and argument on each issue involved in the case.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Unfortunately, no affected market participant was afforded any meaningful notice or any opportunity to be heard here, when the Commission acted with just a few minutes' deliberation in very brief, emergency open meetings. "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner."<sup>34</sup> In other words, the Commission's hasty actions denied market participants the very due process rights that procedural laws such as the APA are designed to protect.

**ii. The February 15 and 16 Orders Did Not Comply with Rulemaking Procedures**

The APA is similarly specific requirements about the procedures for rulemakings, which include, among other things, 30 days' notice, publication in the *Texas Register*, and an opportunity for public comment:

Sec. 2001.023. NOTICE OF PROPOSED RULE. (a) A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule.

(b) A state agency shall file notice of the proposed rule with the secretary of state for publication in the *Texas Register* in the manner prescribed by Chapter 2002.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

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<sup>34</sup> *Tex Workers' Comp Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004) (also noting "A deprivation of personal property without due process violates the United States and Texas Constitutions"); *see also* U.S. CONST, amend. XIV and TEX. CONST. art. I, § 19.

Sec. 2001.029. PUBLIC COMMENT. (a) Before adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing.

(b) A state agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by:

- (1) at least 25 persons;
- (2) a governmental subdivision or agency; or
- (3) an association having at least 25 members.

(c) A state agency shall consider fully all written and oral submissions about a proposed rule.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Again, none of these formalities were followed here. No affected market participant was afforded any meaningful notice or opportunity to provide comments before the Commission acted. Instead, the Commission amended its rules *ad hoc*.

“*Ad hoc* rulemaking occurs when the agency makes a determination that has implications beyond the instant parties, but prefers not to make a formal rule ... An *ad hoc* rule is an agency statement that interprets, implements, or prescribes agency law or policy.”<sup>35</sup> There can be no question that the February 15 and 16 orders prescribed agency policy—they expressly waive portions of Commission rules—and they were issued without any attempt to follow any of the procedural requirements for rulemakings. The APA prohibits any state agency from *ad hoc* rulemaking and rewriting or reinterpreting its own rules without undergoing the formal rulemaking process.

The APA does contain exceptions to notice/hearing requirements for an “emergency rulemaking,” but they do not apply here. Namely, to adopt an emergency rule, the agency must state in the emergency rule that it found “an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires the adoption of a rule on fewer than 30 days’

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<sup>35</sup> *CenterPoint Energy Entex v R.R. Comm’n*, 213 S.W.3d 364, 369 (Tex. App.—Austin 2006, no pet.) (internal citations omitted).

notice.”<sup>36</sup> Emergency orders must also be published in the *Texas Register*.<sup>37</sup> Here, while the orders reference the disaster, they are not characterized as emergency rules; they do not set forth any imminent peril to public health, safety, or welfare; and they have not been published in the *Texas Register*.

Had the Commission found its existing rules lacking during this disaster, then it should have issued a notice and proceed with a proper rulemaking, as it is now doing in Project No. 51871. If the Commission’s rules are amended in that rulemaking, then the new rules will apply prospectively, and market participants will know what the rules are and how they will be applied *before* the next natural or other disaster. In other words, the proper course when the Commission takes issue with one of its properly promulgated rules is to start the process to amend it, *not* to simply ignore it. The Commission cannot issue *ad hoc* orders that contravene its existing rules as it did on February 15 and 16.

Note that the Commission had options to act to reduce the load shed that were within its rules and ERCOT protocols. For example, ERCOT protocols contemplate that fuel or other variable costs may at times exceed the price of electricity and allow ERCOT to dispatch that power out of merit and hold the generator harmless. The Commission and ERCOT did not use this Reliability Unit Commitment (“RUC”) process here. Such narrowly tailored actions not only would have been procedurally correct, but also consistent with market expectations as they would have been based on existing rules and protocols. They also might have been more effective than the overbroad pricing action the Commission took.

The Commission cannot now travel back in time and attempt a more narrowly-tailored option consistent with its rules to more quickly end load shed during the February 2021 winter

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<sup>36</sup> APA § 2001.034(a) and (b).

<sup>37</sup> APA § 2001.034(d).

disaster, but it *can* retroactively mitigate the false pricing it imposed without authority and without proper procedure by reconsidering its orders and correcting the artificial pricing for the entire time period in which those orders were in effect. The market distortions the Commission imposed have cost Texas billions and need to be corrected.

**C. In the Alternative, the Commission Must at Least Enforce its Orders to Ensure that the Artificial Price Adders are Not Imposed *after* Load Shed Directives Ended**

Even if the Commission declines to reconsider the orders in their entirety, at the very least, it must then narrowly enforce those orders and raise prices only during the time when load shed was occurring. This enforcement would help mitigate some of the disruptive impacts of the orders.

The Commission's orders instructed ERCOT to impose an artificial price adder "when we're in load shed,"<sup>38</sup> yet ERCOT allowed the adders to remain for approximately 32 hours after it ended its load shed directives.

This time period may appear brief in the context of the lengthy storm, but every minute truly matters at a \$9,000/MWh price. As calculated by the IMM, this 32 hours of artificially high pricing cost the market up to eleven-figures.<sup>39</sup> Market participants, including Movants, were impacted in a variety of ways depending on their circumstances. The administratively set pricing impacted the magnitude of various ERCOT charges to market participants as well as transactions that are outside the ERCOT settlement process but that are directly driven by and impacted by ERCOT market prices. ERCOT has issued collateral calls to market participants that were unduly inflated based on these erroneous prices. Immediate action is necessary to avoid further

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<sup>38</sup> Open Meeting Tr. at 4:8 (Feb. 15, 2021).

<sup>39</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Potomac Economics' Follow Up Letter (Mar. 11, 2021).

irreversible defaults and other adverse market impacts associated with pricing that was inconsistent with the Commission's own orders.

For all of the above reasons, we urge the Commission to instruct ERCOT to remove the administrative price adders that set prices to \$9,000/MWh from, at the very least, the time ERCOT reduced the firm load shed to zero on the grid (approximately 12:00 a.m. on February 18, 2021) to the time ERCOT finally removed the administrative price adder (9:00 a.m. on February 19, 2021).

#### **IV. CONCLUSION AND PRAYER**

Movants pray and respectfully request that the Commission grant the Movants' motion to reconsider and take actions as they are necessary to mitigate irreparable financial damage:

- Rescind the Commission's February 15 and 16 orders and remove the administrative adder from 10 p.m. February 15 to 9 a.m. February 19, 2021; or
- In the alternative, clarify / enforce the February 15 and 16 orders and remove the administrative adder from 12:00 a.m. February 18 to 9 a.m. February 19, 2021.

It is imperative that ERCOT prices reflect the Commission's clear directives as promptly as possible, as collateral calculations are ongoing and depend on this pricing. Again, every minute counts in these conditions.

Respectfully submitted,



By: \_\_\_\_\_


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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing has been served by email on all parties of record who have provided an email address on this the 12th day of March 2021, in accordance with the Commission's Second Order Suspending Rules, issued on July 16, 2020, in Project No. 50664.



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